Supreme Court, U.S.
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No. 07-201

In the
# Supreme Court of the United States

THE STONEWELL CORP.,

*Petitioner,*

–v.–

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the United States District Court, Middle District of Florida, as to call for the exercise of the supervisory power of the Supreme Court of the United States.

2. Did the Eleventh Circuit err in relying upon a determination by the District Court, that the Eleventh Circuit had reversed, to deprive Stonewell of standing to contest the merits of a forfeiture which resulted in depriving Stonewell of valuable property for which it had paid substantial consideration?

## LIST OF ALL PARTIES

The caption of the case contains the names of all the parties.

## RULE 29.6 STATEMENT

The Stonewell Corp. has no parent corporation and no publicly held company owns 10% or more of the corporation's stock.

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*U.S. v. Weiss*, 2005 WL 1126663, M.D.Fla., May 6, 2005

## PETITION FOR A WRIT OF CERTIORARI

Petitioner, The Stonewell Corp. ("Stonewell"), respectfully petitions the Court for a Writ of Certiorari to review (i) the Order of the United States District Court, Middle District of Florida dated May 6, 2005, granting the United States of America's Motion for Summary Judgment, declaring that Stonewell lacks standing to claim an interest in the Center Mall Mortgage and that the United States is entitled to possession, title and control of the Cent r Mall Mortgage free and clear of any claim by Stonewell, pursuant to 18 U.S.C. §1963(m); (ii) the Final Order of Forfeiture dated the 17th day of May, 2005, decreeing that all right, title and interest in the Proceeds of the Sale of the Center Mall Property be forfeited and vested in the United States; (iii) the Order of the United States Court of Appeals for the Eleventh Circuit dated October, 18, 2006, dismissing Stonewell's appeal for lack of jurisdiction, agreeing with the District Court that Stonewell lacks standing to claim an interest in the Center Mall Mortgage and never reaching the question of whether the Government had met its burden of establishing that the Proceeds of Sale of the Center Mall Property was forfeitable as a substitute asset; and (iv) the denial by the Court of Appeals of Stonewell's petition for panel rehearing and petition for rehearing en banc, filed May 16, 2007.

Due process cannot be achieved when statutory mandates are ignored and issues are contrived, and the proofs that are permitted to be presented are controlled and manipulated in such a way that an open and honest presentation of all of the relevant facts is never accomplished.

If the Government were actually put to its burden of proof to establish its claims (i) that Stonewell has no interest in the Center Mall Mortgage and the Proceeds of Sale of the Center Mall Property; and (ii) that the United States is entitled to

that property as a substitute asset for $3.1 million forfeited by the jury, under 18 U.S.C. §1963(m), it would not be able to meet that burden or proof as a matter of law.

The Government has not been compelled to establish that property's status as a substitute asset because of a series of events which, when taken together, deprived Stonewell of its due process rights. First, the District Court misstated the law and improperly permitted testimony regarding the ownership of the Center Mall Mortgage in a hearing involving solely the ownership of the shares of stock of the corporation, Stonewell. Then, the District Court relied upon that testimony to make a fact finding that was outside the scope of the issues before it. The Eleventh Circuit recognized the error and reversed the District Court.

Thereafter, the Government, relying on a tacit suggestion by the Eleventh Circuit, for the first time, sought the forfeiture of the Center Mall Mortgage. The District Court issued a second amended Preliminary Order of Forfeiture forfeiting the Proceeds of Sale of the Center Mall Property. Stonewell filed its Petition and the Government moved for summary judgment. Giving short shrift to the evidence and ignoring the import of the reversal of the District Court's prior Order by the Eleventh Circuit, the District Court granted the Government's motion on the grounds that the doctrine of collateral estoppel prevents Stonewell from "re-litigating" the ownership of the Center Mall Mortgage.

The Eleventh Circuit avoided a review of this case on the merits by perfunctorily endorsing the District Court's error. This was wrong because the ownership of the Center Mall Mortgage was never fully litigated and the Eleventh Circuit's prior conclusion that the District Court's finding of fact — that the Center Mall Mortgage was never owned by Stonewell was "not clearly erroneous" because it was supported by

the testimony, however dubious, of two of the criminal defendants — may have been binding in the prior proceeding but was not dispositive here.

As a consequence, Stonewell, which was never a criminal defendant, or a participant in the criminal case, never got a chance to get off the bench, walk across the street to the Courthouse and present its proof, derived from the documents contained in the Court's own records, to establish its standing and the veracity and viability of its claim to the Center Mall Mortgage and the Proceeds of Sale of the Center Mall Property, free and clear of any claim by the United States.

The Circuit Court's ruling not only deprived Stonewell of its property — which even the Government agrees Stonewell bought and paid for — it also deprived Stonewell of its due process rights and its day in Court, and buried the real issues which need to be heard in an open, unbiased venue. Only when that is accomplished can due process prevail.

## OPINIONS BELOW

The denial of the petition for rehearing en banc and panel rehearing is unreported and is reproduced in the Appendix at A-1. The Order of the Court of Appeals is reported at 467 F.3d 1300 (11th Cir. 2006) and is reproduced in the Appendix at B-1. The Final Order of Forfeiture is unreported and is reproduced in the Appendix at C-1. The Order Granting Summary Judgment to the United States is reported at 2005 WL 1126663 (M.D.Fla. 2005) and is reproduced in the Appendix at D-1.

## STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1). Pursuant to Supreme Court Rule 13.3, this petition is filed within ninety days of the date of the denial by the Court of Appeals of Stonewell's petition for panel rehearing and petition for rehearing en banc dated May 16, 2007.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(a) 18 U.S.C. §1963 which contains criminal penalties for crimes involving Racketeer Influenced and Corrupt Organizations, and, in particular, 18 U.S.C. §1963(a), (l) and (m).

(b) The United States Constitution, which provides, in relevant part:

> Article III, Section 1, and Section 2, Clause 1: 'The judicial power of the United States, shall be vested in one Supreme Court and . . . shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States. . . .' *Id.*
>
> Amendment V:
>
> 'No person shall . . . be deprived of life, liberty, or property, without due process of law . . .'
>
> Amendment XIV §1:
>
> 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law.'

## STATEMENT OF FACTS

### (a) The Conviction of Sholam Weiss:

On April 29, 1998, the Grand Jury indicted Sholam Weiss ("Weiss") and others, charging violations of 18 U.S.C. §1962, and other criminal statutes, for looting National Heritage Life Insurance Company ("NHL"). The indictment charged, *inter alia*, that in September, 1993, Weiss and others, through Jasper Properties Corp. ("Jasper"), bought the Center Mall Mortgage, a legitimate and valid, pre-existing mortgage, with stolen funds, and hid the Center Mall Mortgage by assigning it to a third party who was acting as Weiss' nominee. The indictment sought forfeiture of the proceeds of Weiss' looting, as well as property derived from those proceeds under 18 U.S.C. §1963.[1]

After a nine month trial, the jury convicted Weiss and others of multiple counts of fraud. The forfeiture presentation was made to the Jury in November, 1999 — six years after the Center Mall Mortgage was assigned to Jasper in September of 1993 and two years after the Center Mall Property was sold under the supervision of the Court in the Williams Action and the proceeds of the sale deposited in an escrow account to abide the outcome of that lawsuit. See *infra*.

Although the Government was well aware of their existence, the jury was not asked to forfeit the Center Mall Mortgage or the Proceeds of the Sale of the Center Mall Property. They are not referenced in the Special Verdict of Forfeiture or the Court's Preliminary Order of Forfeiture in its original form or as amended.

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[1] The Indictment also alleges that the Center Mall Mortgage was actually satisfied in 1993.

**(b) The Forfeiture of the Corporation, Stonewell:**

A Preliminary Order of Forfeiture was filed February 4, 2000 and amended on May 12, 2000 granting the Government possession of sixty-two items of property, including all right, title and interest of defendant, Weiss, and Keith Pound in Stonewell.[2]

Richard Gladstone ("Gladstone"), the sole shareholder, officer and director of Stonewell, filed a petition under 18 U.S.C. §1963(l) following receipt of notice of the forfeiture of the corporation, Stonewell. The facts surrounding that petition are discussed starting at page 12 of this Petition.

**(c) The Stonewell Petition Concerning the Proceeds of Sale of the Center Mall Property:**

Four years later, on July 20, 2004, the Government moved for a Second Amended Preliminary Order of Forfeiture seeking forfeiture of the "Center Mall Mortgage" on two theories. Theory One — the Center Mall Mortgage was forfeitable as an asset directly traceable to money forfeited ($3.1 million) by the jury in its Special Verdict of Forfeiture and by the Court in its Amended Preliminary Order of Forfeiture. Theory Two — the Center Mall Mortgage should be forfeited as a substitute asset for the $3,100,000.00 under 18 U.S.C. §1963(m).

The District Court entered a Second Preliminary Order of Forfeiture forfeiting, not the Center Mall Mortgage, but "all right, title and interest of defendant, Weiss, in the Proceeds of the Sale of the Center Mall located in Monmouth County, New Jersey" ("Proceeds of the Sale of the Center Mall Property").

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[2] The Government withdrew the claim as to Pound in response to Richard Gladstone's Motion for Summary Judgment made in connection with his petition brought under 18 U.S.C. 1963(l), as the owner of the shares of stock of Stonewell (see *infra*).

Stonewell filed a "Petition of Innocent Owner-Claim to Property," claiming that Proceeds of the Sale of the Center Mall Property were not properly forfeit and requesting an evidentiary hearing as to whether it had a vested legal right, title, and ownership interest in the Proceeds of the Sale of the Center Mall Property[3] under 18 U.S.C. §1963.

In its Petition, Stonewell raised five claims:

(a) As a consequence of the Eleventh Circuit's Mandate regarding the Gladstone Petition (Appendix F-1), the Proceeds of the Sale of the Center Mall Property are not forfeitable to the United States.

(b) The United States District Court, Middle District of Florida does not have jurisdiction over the Proceeds of the Sale of the Center Mall Property, which lies with the United States District Court, Southern District of New York, the Honorable Charles L. Brieant presiding,[4] as that Court exercised exclusive control over both the creation of the fund and the distribution of the Proceeds of the Sale of the Center Mall Property in the Williams Action since 1996 and still exercises control to date.

(c) The Proceeds of the Sale of the Center Mall Property are not forfeitable under Rule 32.2(e)(i)(A) (Appendix N-1).

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[3] The Gladstone Petition concerning the forfeiture of Stonewell is discussed *infra* at p. 12 of this Petition.

[4] Action commenced in 1996 in the United States District Court, Southern District of New York entitled "Donna Lee H. Williams, Insurance Commissioner of the State of Delaware, as Receiver for National Heritage Life Insurance Company in Liquidation v. LPDA Acquisition Corp., a New York Corporation, Future Diversified Projects, Inc., a New York Corporation, National Mortgage Corporation, a New York Corporation and Lyle K. Pfeffer, Individually, Michael D. Blutrich, Individually, Deborah Aronow, Individually, and Catskill Funtime, Inc., a New York Corporation."

(d) The Proceeds of the Sale of the Center Mall Property are not forfeitable as substitute property under 18 U.S.C. §1963(m) (Appendix M).

(e) Stonewell has a vested legal right, title and ownership interest in the Proceeds of the Sale of the Center Mall Property which renders the Second Amended Preliminary Order of Forfeiture invalid.

The Government moved for Summary Judgment on the Stonewell Petition, arguing that the Second Amended Preliminary Order of Forfeiture was valid because the Center Mall Mortgage is an asset directly traceable to the $3.1 million forfeited by the jury pursuant to 18 U.S.C. §1963(a) or, alternatively, the Center Mall Mortgage is a substitute asset for the $3.1 million, pursuant to 18 U.S.C. §1963(m). The Government also argued that Stonewell lacks standing to contest the forfeiture of defendant Weiss' interest in the Proceeds of the Sale of the Center Mall.

Stonewell argued, among other things, that the Government's "substitute asset" theory is belied by the Indictment (among other Government documents), the forfeiture argument made by the prosecutor during the forfeiture phase of the criminal trial and the jury's Special Verdict of Forfeiture. The requirements of §1963(m) have not been satisfied here. Section 1963(m)(1), in particular, requires that the forfeited property described in §1963(a) cannot be located upon the exercise of due diligence, as a result of any act or omission of the defendant. Here, the Government admittedly always knew the whereabouts of the Center Mall Mortgage which the Government has on occasion erroneously alleged was purchased with the $3.1 million in September of 1993. Further, the Government was well aware of the sale of the Center Mall Property and the fact that the sale proceeds were being held in escrow in the Williams Action under the jurisdiction of the United States District Court, Southern District of

New York. Therefore, the conditions precedent to the implementation of §1963(m)(1) are not satisfied. If the Government believed the Center Mall Mortgage or the Proceeds of the Sale of the Center Mall Property were forfeitable, it had a duty to forfeit them under §1963(a). Furthermore, the Indictment clearly states at ¶167 and the documentary evidence clearly establishes that, of the $3.1 million paid to UJB in 1993 for an assignment of the Center Mall Mortgage, over $1.9 million, came from non-indicted principals of the fee owner of the property, Center Mall, Inc. Only $3.1 million was paid to UJB and the $1.9 million provided by the non-indicted principals of Center Mall, Inc. was a substantial portion of the required consideration to purchase the assignment of the mortgage. Moreover, by the Government's own account, at least a portion of the $3.1 million went to Morris World Trading, S.A, not the purchaser of the Center Mall Mortgage at all. On that basis, Morris World Trading, S.A. was forfeited by the jury. Therefore, whether the Proceeds of the Sale of the Center Mall Property was forfeitable as a substitute asset within the meaning of 18 U.S.C. 1963(m) presents a question of fact.

By Order dated May 6, 2005 (Appendix D-1), the District Court held that the Center Mall Mortgage could not be forfeited as an asset directly traceable to the $3.1 million forfeited by the jury but that it *was* forfeited as a substitute asset for the $3,100,000.00, and granted summary judgment to the Government awarding the United States possession, title and control of the Center Mall Mortgage. This holding is at least partially inconsistent with the Government's known evidence and the prosecutor's position at the Criminal Trial. The Court concluded that Stonewell was unable to establish any criteria necessary to defeat the Government's "entitlement under the Second Amended Preliminary Order of Forfeiture"

in light of the Court's prior finding that the Center Mall Mortgage was not an asset of Stonewell in connection with the petition filed by Richard Gladstone under 18 U.S.C. §1963(l).[5]

On May 17, 2005, the District Court granted a Final Order of Forfeiture (Appendix C-1) which holds, in pertinent part, as follows:

> AND WHEREAS ... the United States is entitled to possession, title and control of the Center Mall mortgage, and by extension the proceeds of the sale of the Center Mall property, free and clear of any claim of Stonewell.
>
> * * *
>
> It is HEREBY ORDERED, ADJUDGED and DECREED:
>
> 1. That all right, title and interest to the above-described proceeds is hereby condemned, forfeited and vested in the United States of America as to all parties and shall be disposed of according to law; and[6]

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[5] Stonewell contends that the District Court's prior findings regarding the Center Mall Mortgage are dicta, are not law of the case and do not constitute collateral estoppel in connection with the Stonewell Petition, and that Stonewell presented irrefutable evidence sufficient to defeat the Government's Motion for Summary Judgment (see *infra*).

[6] The Court's leap from the "Center Mall Mortgage" to the "Proceeds of Sale of the Center Mall Property" bears striking similarities to the error committed by the District Court in the Final Order of Forfeiture forfeiting the Center Mall Mortgage in response to the Gladstone 1963(l) Petition pertaining to the forfeiture of the shares of stock of Stonewell (Appendix H-1), which Order was reversed by the Eleventh Circuit (Appendix E-1).

The District Court prematurely granted the Final Order of Forfeiture. Stonewell's motion to vacate the Final Order of Forfeiture and to compel the Court to consider Stonewell's opposition papers was denied.[7]

Stonewell appealed to the Eleventh Circuit from (1) the grant of Summary Judgment in favor of the Government, (2) the Second Amended Preliminary Order of Forfeiture, and (3) the Final Order of Forfeiture, giving the Government the proceeds of the sale of the Center Mall Property.

By Order dated October 18, 2006, the Eleventh Circuit dismissed the appeal for lack of jurisdiction on the basis that Stonewell lacked standing to claim an interest in the mortgage on the Center Mall Property (Appendix B-1). Stonewell's subsequent petition for hearing en banc, which the Eleventh Circuit construed as a motion for reconsideration of its prior order, was denied (Appendix A-1).

The Circuit Court dismissed the Stonewell appeal for lack of standing based upon evidence that was improperly included in the record created during prior proceedings on what shall be called the Gladstone Petition, despite its lack of relevance to the determination of that Petition and despite the Circuit Court's subsequent finding that the District Court did not have jurisdiction to try the issue that this "evidence" addressed.

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[7] Local Rule 3.01(b) provides a party opposing any application with the opportunity to file and serve such opposition within ten days after service of such motion or application. The Court granted the Government's motion before ten days had passed.

**(d) <u>The Prior Gladstone Petition Regarding the Forfeiture of Stonewell</u>:**

On April 5, 2000, Gladstone, as the owner of all the shares of stock of Stonewell, filed a "Petition of Innocent Owner-Claim to Property" under 18 U.S.C. §1963(l) regarding the forfeiture of Stonewell. Gladstone alleged that he had full and complete ownership of Stonewell, as its sole shareholder, officer and director.

Gladstone moved for Summary Judgment on the basis that the only issue before the Court was the ownership of the stock of Stonewell, he was Stonewell's sole stockholder and Weiss had no interest in the company.

In opposing Gladstone's Motion, the Government argued that, despite the Government's failure to seek its forfeiture, the Center Mall Mortgage was subject to forfeiture because it was the Stonewell asset having a nexus to Weiss' racketeering activities.

After Gladstone's motion was fully briefed, the Magistrate Judge took the unusual step of ordering the parties to file and serve supplemental memoranda of law addressing the question of whether the forfeitable "interest" Weiss had in Stonewell, if any, included assets of Stonewell as well as stock of Stonewell. She said that it was incumbent on the United States, "if it wished to survive summary judgment, to state with specificity the law and the facts that supported its assertion that the jury's special verdict of forfeiture could be legally construed to be a forfeiture of the assets of Stonewell" (Appendix L-1).[8]

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[8] Significantly, the Magistrate's original thought process is consistent with the Circuit Court's ultimate ruling (Appendix E-1).

Notwithstanding the Magistrate's warning and the Government's failure to abide by it, Gladstone's motion for summary judgment was denied. The District Court (Fawsett, J.) held that, "the interests in Stonewell that the jury found to be forfeited were not limited to the Corporation's stock. The jury forfeited Weiss' interest in Stonewell, which could be a forfeiture of Stonewell's assets having a nexus to Weiss' money laundering activities, such as the Center Point Mall Mortgage" (Appendix H-1).

An evidentiary hearing on the Gladstone Petition was held before the Magistrate Judge pursuant to 18 U.S.C. 1963(l). In the course of the proceeding on the Gladstone Petition, despite the fact that it was not relevant to the forfeiture of Stonewell, the United States argued and was permitted to argue that the Center Mall Mortgage was Weiss' property and that it had never been an asset of Stonewell.

In the Magistrate's Report and Recommendation following the Hearing she noted that despite Gladstone's contention that the jury's forfeiture decision only forfeited shares of stock in Stonewell, "In light of Judge Fawsett's conclusion that the forfeiture also applies to assets of Stonewell", she was going to "construe the petition to be one made by Gladstone, on behalf of Stonewell, contesting forfeiture of Stonewell's assets" (Appendix I-2, fn.1). Based upon this construction, the Magistrate recommended that the Court find that Gladstone sustained his burden of proof with respect to his ownership of the stock of Stonewell but that Gladstone had not sustained his burden of proof with respect to Stonewell's interest in the Center Mall Mortgage and the proceeds of the sale of the Center Mall Property.

On October 29, 2002, the District Court entered its Order, holding that the Government was entitled to possession, title and control of the Center Mall Mortgage free and clear of any claim of Stonewell or Gladstone (Appendix H-1).

The District Court held that the circumstantial evidence showed that Gladstone, through Stonewell, was Weiss' nominee with reference to the Center Mall Mortgage acquisition, that the Center Mall Mortgage was not an asset owned by Stonewell, and that Gladstone, using Stonewell, acted as Weiss' nominee to hide Weiss' interest in the Center Mall Mortgage. The District Court held that because the Center Mall Mortgage was never owned by Stonewell in its own right, it had no standing to contest the finding that the mortgage should be forfeited to the Government (*Id.*).

In a footnote to the District Court's Order on the Gladstone Petition (Appendix H-27), the Court establishes that she completely misunderstood the identity of the Petitioner, the forfeited property, and the issues, as follows:

> The Court notes that Mr. Gladstone brought his claim in his own right. Stonewell Corporation did not file a claim to the mortgage which was the subject of this forfeiture proceeding, although Gladstone claims that Stonewell is a duly formed and existing corporation to which assignment of the mortgage was made. Under these facts, Gladstone has no standing to sue because under the Federal Rules of Civil Procedure "[e]very action shall be prosecuted in the name of the real party in interest." Fed.R.Civ.P. 17(a). It is well established that the assets of a corporation belong to the corporation, even if it has, as in the instant case, only a single shareholder. *See, e.g. Carney v. General Motors Corp.*, 23 F.3d 1154, 1157 (7th Cir. 1994) (holding that a sole shareholder may not bring an action in his own name to recover assets that belong to the corporation).

The District Court also had this to say with respect to the item forfeited (Appendix H-26):

> Finally, Gladstone argues, in essence, that forfeiture is precluded by the technicality that the jury's verdict form did not specifically target the mortgage as a forfeitable item, instead referring only to Weiss' interests in Stonewell. This is singularly unpersuasive.

Gladstone appealed the District Court's October 29, 2002 Order. Thereafter, the Government's motion for a Final Judgment of Forfeiture was granted (Appendix G-1). Gladstone filed a Second Notice of Appeal and the two appeals were consolidated.

The Eleventh Circuit *reversed* the District Court's Order and vacated the Final Judgment, finding that the Court overstepped the bounds of its jurisdiction under 18 U.S.C. Section 1963(l) by awarding possession of the Center Mall Mortgage to the Government (Appendix E-1). The Eleventh Circuit held that the Court "had no jurisdiction to determine the ownership rights to the Center Mall Mortgage because the jury did not find the Center Mall Mortgage to be forfeit either in its own right or as an asset of Stonewell" (Appendix E-11).

The Eleventh Circuit held (Appendix E-1), *inter alia*:

(a) "A District Court has no power to give the United States title to a defendant's interest in forfeited property unless forfeiture has been made part of the defendant's sentence," *citing*, *United States v. Pease*, 331 F.3d 809, 813 (11th Cir. 2003).

(b) "Absent a waiver of the right to trial by jury, the District Court cannot include forfeiture of property in the defendant's sentence unless a jury has found that property to be forfeit," *citing United States v. Gilbert*, 244 F.3d at 888, 915-16 (11th Cir. 2001).

In regard to Appeal 02-16844, the Eleventh Circuit reversed that portion of the District Court's judgment giving the Center Mall Mortgage to the United States, finding that the District Court had *no jurisdiction* to award the Center Mall Mortgage to the United States because the jury did not find that the Center Mall Mortgage was forfeit, and the District Court did not include the forfeiture of the Center Mall Mortgage in WEISS' sentence (Appendix E-11).

In regard to Appeal 03-12264, the Eleventh Circuit vacated the District Court's Final Judgment of Forfeiture on the basis that this judgment was predicated on the Court's earlier decision to award the Center Mall Mortgage to the United States and that earlier decision was *reversed* (Appendix E-11).

Two statements in that Eleventh Circuit Decision have been wrongfully relied upon to deny due process to Stonewell and prevent Stonewell from having its day in Court. First, in a footnote, the Circuit Court stated that it expressed "no opinion" on the Government's ability to pursue the Center Mall Mortgage based on the forfeiture of the $3,100,000.00 (Appendix E-5, fn.2). The Government immediately sought the forfeiture of the Center Mall Mortgage as a traceable or substitute asset for the $3.1 million forfeited by the jury.

Second, the Circuit Court held that the District Court's finding that:

> "[T]he evidence shows that this [the Center Mall Mortgage] was not an asset owned by Stonewell. Gladstone, using this corporation, acted as Weiss' nominee to hide Weiss' interest in the mortgage. The asset, the mortgage, was never owned by Stonewell in its own right."

is not "clearly erroneous" because it is "amply supported by the testimony" of two criminal masterminds, Lyle Pfeffer and Michael Blutrich (Appendix E-10). The District Court relied

upon this statement to support its conclusion that under the doctrines of law of the case and collateral estoppel Stonewell did not have standing to file a petition and could not "relitigate" its claim to the Center Mall Mortgage and the Proceeds of the Sale of the Center Mall Property.

## ARGUMENT

### I. STONEWELL'S STANDING CANNOT BE DENIED AS THE GOVERNMENT CAN HAVE ONLY THAT INTEREST WHICH THE CRIMINAL DEFENDANT HELD IN THE PROPERTY, AND THE GOVERNMENT'S OWN VERSION OF THE FACTS ESTABLISHES THAT WEISS DID NOT HAVE AN INTEREST IN 100% OF THE MORTGAGE

The Government is determined to pursue and punish Stonewell — an entity that was not a criminal defendant and against which no jury has returned a verdict of guilt — for a perceived wrong, and is happy to do so by whatever backdoor means are available.

This is not the purpose of an in personam forfeiture. Because it seeks to penalize a defendant for his alleged activities, in personam forfeiture reaches only that property or portion thereof owned by the defendant. The property itself is not forfeited; only the defendant's interest in the property is forfeited. *U.S. v. Gilbert*, 244 F.3d 888, 919 (11th Cir. 2001).

### II. THE GOVERNMENT IS NOT ENTITLED TO ANY PORTION OF THE CENTER MALL MORTGAGE AS A SUBSTITUTE ASSET

Under the substitute asset provision of the forfeiture statute, the Government can reach only the defendant's substitute assets, not assets of third parties to which tainted assets have been transferred. *U.S. v. Saccoccia*, 354 F.3d 9 (1st Cir. 2003).

*U.S. v. Bornfield*, 145 F.3d 1123 (10th Cir. 1998) holds that to be forfeited as a traceable asset, an asset must have been involved in or traceable to the offense and that to be forfeited as a substitute asset, an asset must be an "other" asset of the defendant and be forfeited in lieu of a forfeitable

asset which is unavailable due to some act or omission of the defendant. *Id.* at 1139. Thus, substitute property, by its very nature, is not connected to the crime. *U.S. v. Lester*, 85 F.3d 1409 (9th Cir. 1996); *U.S. v. Saccoccia*, 354 F.3d at 12; *U.S. v. Lee*, 232 F.3d 556 (7th Cir. 2000).

To be a substitute asset, not only must the asset not be traceable to the illegal conduct, it must also be an asset "of the defendant." 18 U.S.C. 1963(m).

Petitioner contends that since the Government has always argued that the Center Mall Mortgage is traceable to the illegal conduct, it is not forfeitable as a substitute asset regardless of whether or not the Government pursued it as a traceable asset. *U.S. v. Bornfield, supra.* And that is the end of the discussion. However, even if petitioner is incorrect and a traceable asset is also forfeitable as a substitute asset, the Government still has the burden of establishing that the Center Mall Mortgage is an asset of Weiss (only defendant's interest in property can be forfeited, *U.S. v. Gilbert*, at 919) and that the elements of 18 U.S.C. 1963(m) have been satisfied.

The Center Mall Mortgage was improperly declared forfeited and the District Court's Orders and Final Order should be reversed.

## III. THE LAW OF THE CASE DOCTRINE DOES NOT PRECLUDE STONEWELL FROM LITIGATING THE ISSUES RAISED IN ITS PETITION

Law of the case should not be applied where to do so would work a manifest injustice. *Murphy v. F.D.I.C.*, 208 F.3d 959, 966 (11th Cir. 2000). Public policy does not favor such a result. Stonewell was entitled to all favorable inferences which can be drawn from all the evidence, not just the evidence from the criminal trial or the selected evidence improperly introduced by the Government during

the Gladstone 1963(l) Petition, on an issue that was not properly before the Court. See *Phoenix Savings and Loan, Inc. v. Aetna Casualty and Surety Co.*, 381 F.2d 245, 249 (4th Cir. 1967).

The Eleventh Circuit's finding that the District Court lacked jurisdiction over the Center Mall Mortgage in regard to the Gladstone Petition renders the Circuit Court's discussion of any other facts non-binding dicta. See *In re City of Philadelphia Litigation*, 158 F.3d 711, 718 (3rd Cir. 1998) ("The law of the case doctrine, however, acts to preclude review of only those legal issues that the court in a prior appeal actually decided, either expressly or by implication; it does not apply to dicta"); *Hanover Ins. Co. v. American Engineering Co.*, 105 F.3d 306, 312 (6th Cir. 1997) (the law of the case "doctrine itself is limited to those questions necessarily decided in the earlier appeal"); *John Morrell & Co. v. Local Union 304A of UFCW*, 913 F.2d 544, 550 (8th Cir. 1990) ("We need not follow dicta, however, and we are satisfied that the language identified by the Unions in our earlier *Morrell* opinion was not essential to the judgment in that case").

The Eleventh Circuit did not undertake a complete or binding evaluation or resolution of the facts and the law applicable thereto because it ruled the district court was without jurisdiction. The merits of Stonewell's objections have not yet been bindingly ruled upon, and the district court should be directed to reconsider its prior factual findings, particularly when they are dicta and there is contradicting evidence. See, *U.S. v. Eleven Vehicles*, 898 F.Supp. 1143 (E.D.Pa. 1995) (law of the case did not bar judge in RICO action from reconsidering judge's own prior ruling, particularly when it was effectively dicta).

## IV. THE DOCTRINE OF COLLATERAL ESTOPPEL DOES NOT PRECLUDE STONEWELL FROM LITIGATING THE ISSUES RAISED IN THE PETITION

The doctrine of collateral estoppel should not have been applied to preclude the introduction of evidence pertaining to Stonewell's claim to the Proceeds of Sale of Center Mall Mortgage.

Collateral estoppel can only preclude relitigation of issues of fact or law necessary to a court's judgment. *United States v. Alaska*, 521 U.S. 1, 117 S.Ct. 1888 (1997); *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 99 S.Ct. 645 (1979). The party seeking to invoke collateral estoppel must establish that (1) the issue in the pending case is identical to that decided in a prior proceeding, (2) the issue was necessarily decided in the prior proceeding, (3) the party to be estopped was a party or was adequately represented by a party in the prior proceeding, and (4) the precluded issue was actually litigated in the prior proceeding. *Blohm v. Comm'r of Internal Revenue*, 94 F.2d 1542, 1553 (11th Cir. 1993).

This important legal standard was not satisfied. Where the requirements of collateral estoppel are not met, it is error to apply collateral estoppel. *Kroeger v. U.S. Postal Service*, 865 F.2d 235 (Fed. Cir. 1988). The determination of the Circuit Court is in direct conflict with precedent of the Supreme Court. Stonewell has standing to proceed by 18 U.S.C. 1963(l) and the Government's motion for summary judgment should have been denied.

## A. THE OWNERSHIP OF THE CENTER MALL MORTGAGE WAS NOT AN ISSUE IDENTICAL TO, OR "ESSENTIAL" OR "NECESSARY" TO THE JUDGMENT ON THE STONEWELL PETITION

The issues raised in the Gladstone Petition and the Stonewell Petition are different issues required to be proved by different evidence. The District Court did not need to engage in an analysis of the history of the Center Mall Mortgage to determine Gladstone's interest in Stonewell. It is only due to the District Court's improper denial of summary judgment to Gladstone, based upon the erroneous finding that "the interests in Stonewell that the jury found to be forfeited were not limited by the jury to the corporation's stock[9] and the Court's ongoing disregard of what was forfeited, that the Center Mall Mortgage was even brought up in response to the Gladstone Petition.

Ultimately, the District Court held that Gladstone was the rightful owner of Stonewell and it could have stopped right there. Its additional fact finding regarding the Center Mall Mortgage is superfluous.

When a fact is not necessarily determined in a former trial, the possibility that it may have been does not prevent re-examination of that same issue. *U.S. v. Levy*, 803 F.2d 1390 (5th Cir. 1986); *U.S. v. Lee*, 622 F.2d 787 (5th Cir. 1980).

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[9] The cases which establish that the Government recognizes the distinction between the forfeiture of a corporation and the forfeiture of an asset owned by a corporation are legion. e.g., *United States v. New Silver Palace Restaurant, Inc.*, 810 F.Supp 440 (E.D.N.Y. 1992); *Homan & Crimen, Inc. v. Harris*, 626 F.2d 1201 (5th Cir. 1980). Gladstone did not have standing to contest the forfeiture of any specific asset of Stonewell. See *U.S. v. All Right, Title, etc.*, 2005 WL 2649001 (S.D.N.Y. 2005).

## B. OWNERSHIP OF THE CENTER MALL MORTGAGE WAS NOT FULLY OR FAIRLY DETERMINED IN THE PRIOR PROCEEDING

The Gladstone Petition was filed in accordance with 18 U.S.C. §1963 in response to the forfeiture of Stonewell. But the District Court permitted the Government to try the forfeiture of the Center Mall Mortgage, which was not forfeited until four years later. In football parlance, an "end-run" was performed. Answers.com defines an end-run as "a maneuver in which impediments are bypassed, often by deceit or trickery," as in "he made an end-run around the department of finance officer in order to increase the budget." In this case, the end-run was around the procedural requirements of 18 U.S.C. §1963 et seq. and Rule 32.2 of the Federal Rules of Criminal Procedure.

Consequently, the District Court's ruling was "reversed" by the Eleventh Circuit (Appendix E-1). The fact findings which were not reversed by the Eleventh Circuit in the context of reversing District Court, should not have a binding effect. The Circuit Court may have been constrained not to overturn the District Court's findings of fact during the appeal pertaining to the Gladstone Petition because that "fact" was supported by testimony of two of the criminal defendants, Lyle Pfeffer and Michael Blutrich. But that finding is not dispositive of the Stonewell Petition — involving the forfeiture of the Center Mall Mortgage as a substitute asset for the $3.1 million.

Stonewell has established its standing and is entitled to a full and fair opportunity to establish that the Center Mall Mortgage is not a Substitute Asset for the $3.1 million forfeited by the jury. If the Court were to stand by the forfeiture of the entire Center Mall Mortgage despite Stonewell's claim to a valid interest in at least a portion of that asset, it would wrongfully punish Stonewell, an entity against which

no jury has returned a verdict of guilt. This would constitute a deprivation of Stonewell's property without due process. See, e.g., *Pacheco v. Serendensky*, 393 F.3d 348 (2d Cir. 2004).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated: Carle Place, New York
August 10, 2007

Respectfully submitted,

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# APPENDIX

**Appendix A**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY 16 2007
THOMAS K. KAHN
CLERK

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No. 05-13661-DD
No. 05-13955-DD
No. 05-14012-DD

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SHOLAM WEISS,

Defendant,

THE STONEWELL CORPORATION,

Claimant-Appellant.

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Appeal from the United States District Court for the
Middle District of Florida

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BEFORE: EDMONDSON, Chief Judge, BIRCH and ALARCON,* Circuit Judges.

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* Honorable Arthur L. Alarcon, United States Circuit Judge for the Ninth Circuit, sitting by designation.

BY THE COURT:

Appellant's petition for hearing en banc construed as a motion for reconsideration of this Courts, October 18, 2006, order is DENIED.

**Appendix B**

[PUBLISH]

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
October 18, 2006
THOMAS K. KAHN
CLERK

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Nos. 05-13661, 05-13955, 05-14012

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D. C. Docket No. 98-00099-CR-ORL-19-DAB

UNITED STATES OF AMERICA,

Plaintiffs-Appellee,

versus

SHOLAM WEISS,

Defendant.

THE STONEWELL CORPORATION,

Claimant-Appellant.

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Appeal from the United States District Court for the
Middle District of Florida

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**(October 18, 2006)**

Before EDMONDSON, BIRCH and ALARCÓN,* Circuit Judges.

ALARCÓN, Circuit Judge:

The Stonewell Corporation ("Stonewell") appeals from 1) the Summary Judgment in favor of the Government, 2) the Second Amended Preliminary Order of Forfeiture, and 3) the Final Order of Forfeiture, giving the United States the proceeds of the sale of a property known as the Center Mall ("the Center Mall property"). These orders effectuate the District Court's order on Stonewell's petition filed pursuant to 18 U.S.C. § 1963 (2000).

The District Court determined that Stonewell lacked standing to claim an interest in a mortgage on the Center Mall property ("Center Mall mortgage") and was otherwise "unable to establish any of the criteria necessary to defeat the Government's entitlement under the Second Amended Preliminary Order of Forfeiture." Thus, the District Court concluded that the Government was entitled to "all right, title, and interest of Defendant, Sholam Weiss, in the proceeds of the sale of the Center Mall located in Monmouth County, New Jersey," free and clear of any claim of Stonewell. The District Court ordered the forfeiture of the Center Mall mortgage as a substitute asset pursuant to 18 U.S.C. § 1963(m) (2000). We agree with the District Court that Stonewell lacks standing to claim an interest in the mortgage on the Center Mall property. We dismiss this appeal for lack of jurisdiction.

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* Honorable Arthur L. Alarcón, United States Circuit Judge for the Ninth Circuit, sitting by designation.

## I

Sholam Weiss, Michael Blutrich, Lyle Pfeffer, and others schemed to defraud the National Heritage Life Insurance Company ("NHLIC") of millions of dollars and to use the stolen funds to commit further frauds. The conspiracy began around 1990 and was carried out for nearly a decade. Part of the scheme involved laundering money stolen from NHLIC through a series of property purchases and resales to corporations set up by nominees of Mr. Weiss.[1] Stonewell was one such nominee who, through its officer, director and shareholder, Richard Gladstone, knowingly became involved in Mr. Weiss's money laundering scheme.

### A

On April 29, 1998, a grand jury in the Middle District of Florida indicted Mr. Weiss on charges of violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962 (2000), and other criminal statutes, in relation to the looting of NHLIC. On November 2, 1999, following a jury trial, Mr. Weiss and his co-defendants were convicted on charges of violating 18 U.S.C. § 1962, and other criminal statutes.[2] The indictment charged that Mr. Weiss used funds stolen from NHLIC to purchase an asset

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[1] A person cannot have a vested interest in property if he is found to be acting as a nominee for persons whose property is subject to the forfeiture. *Braxton v. United States*, 858 F.2d 650, 652-53 (11th Cir. 1988). Nominee "connotes the delegation of authority to the nominee in a representative or nominal capacity only, and does not connote the transfer or assignment to the nominee of any property in, or ownership of, the rights of the person nominating him." *Id.* at 653 n.6.

[2] Mr. Weiss's co-defendants were Keith Pound, Jan R. Schneiderman, Richard B. Herman, Isack Rosenberg, Nadine Allen, Robert Gorski, Richard Langer, South Star Management, Inc., Ados Equities, Inc., National Housing Exchange, Inc., APX Mortgage Services, Inc., Resource Asset Management, Inc., National Workout Specialist, Inc., and Sprite Equities, Inc.

known as the Center Mall mortgage and hid the mortgage by assigning it to persons acting as Mr. Weiss's nominees. The indictment sought forfeiture of the proceeds of Mr. Weiss's looting under 18 U.S.C. § 1963. The jury rendered a special verdict of forfeiture for several items of property, including the sum of $3.1 million which Mr. Weiss had stolen and used to buy the Center Mall mortgage. The special verdict also forfeited Mr. Weiss's interest in several companies, including Center Mall, Inc., Center Point Mall, Inc., Jasper Properties, Inc., and the Stonewell Corporation.

**B**

As a result of the special verdict, the District Court for the Middle District of Florida filed a preliminary order of forfeiture on November 2, 1999. An amended order was filed on May 12, 2000. The order forfeited, *inter alia*, "all right, title and interest of defendant, Sholam Weiss" in "Stonewell Corp." and $3.1 million which "sum represents the amount of money involved in [the Center Mall transaction] . . . that was obtained by defendant or that the defendant could reasonably foresee would be obtained by other members of the . . . conspiracy, during the course of the criminal conduct."

On April 5, 2000, Mr. Gladstone filed a petition of innocent owner in the Middle District of Florida forfeiture proceeding ("Gladstone Petition"), contesting the forfeiture of Stonewell. In his petition, Mr. Gladstone asserted that he was the "sole shareholder, officer and director" of Stonewell and therefore Stonewell should be surrendered to him. On April 27, 2001, Mr. Gladstone filed a Motion for Summary Judgment in the Middle District of Florida forfeiture proceeding, claiming Stonewell was a subsequent bona fide purchaser of the assignment of the Center Mall mortgage.

Magistrate Judge Spaulding held extensive evidentiary hearings in the Gladstone Petition proceeding.[3] The testimony of Mr. Gladstone, Mr. Pfeffer, Mr. Blutrich, and Ms. Schneiderman established that in early 1997, Mr. Gladstone was introduced to Mr. Weiss through a mutual acquaintance. Mr. Weiss suggested to Mr. Gladstone that he buy an assignment of the mortgage on the Center Mall property, owned at the time by Mr. Weiss's nominee, Jasper Properties, Inc. ("the Jasper mortgage"). Mr. Weiss proposed selling the Jasper mortgage to Mr. Gladstone at a discount, in exchange for the forgiveness of an unpaid loan Mr. Gladstone had made to New Contenders, a company with which Mr. Blutrich was affiliated. Mr. Pfeffer told Mr. Gladstone that the mortgage was non-performing and that tax payments were delinquent. Mr. Gladstone understood that in order for him to recover any funds from a non-performing mortgage, he would have to foreclose on the property. Mr. Pfeffer also told Mr. Gladstone, in the presence of Mr. Blutrich and Mr. Weiss, that there was a *lis pendens* on the property.

On March 12, 1997, Mr. Gladstone formed Stonewell to hold the assignment of the Jasper mortgage. Mr. Gladstone has been, at all times, the sole officer, director and shareholder of Stonewell. On March 20, 1997, Mr. Gladstone went to Mr. Pfeffer's office in New York. There, Mr. Pfeffer signed documents assigning the Jasper mortgage to Stonewell. Mr. Gladstone told Mr. Pfeffer that he was stepping into Mr. Pfeffer's shoes as Weiss's nominee in causing Stonewell to acquire the Center Mall mortgage. Mr. Gladstone also told Mr. Pfeffer that Mr. Weiss had agreed to return the money that Mr. Gladstone was paying to purchase the assignment.

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[3] Evidentiary hearings were held August 20, 21, 22 and 23, 2001, and on November 13 and 14, 2001.

After the assignment of the Jasper mortgage, Mr. Weiss told Mr. Pfeffer "not to worry" because they "were still at some point going to be able to realize a lot of money out of the property and that he was in control of everything." After the Jasper mortgage was assigned to Stonewell, Mr. Gladstone did not send any demand letters to the owner of the Center Mall property or begin foreclosure proceedings.

The District Court denied the Gladstone Petition, holding instead that the Government was entitled to the Center Mall mortgage. The District Court held that Mr. Gladstone acted as one of Mr. Weiss's nominees when he created Stonewell to accept the Center Mall mortgage. Because Mr. Gladstone and Stonewell were nominees of Mr. Weiss, Stonewell never owned the mortgage in its own right. The District Court concluded that Mr. Gladstone did not have standing to contest the forfeiture of the Center Mall mortgage and ordered that the mortgage be forfeited to the Government.

On December 17, 2003, Mr. Gladstone filed a notice of appeal to this Court. On April 15, 2004, this Court reversed the Middle District of Florida's ruling, in part, holding that it exceeded the scope of its authority in awarding the Center Mall mortgage to the Government. The special verdict form from Mr. Weiss's criminal trial directed that Mr. Weiss's interest in certain companies involved in the Center Mall mortgage transaction be forfeited, including Center Mall, Inc., Center Point Mall, Inc., Jasper Properties, Inc., and Stonewell. The special verdict form did not include the Center Mall mortgage itself as an asset that was forfeited. This Court stated in a footnote that it had "no opinion" on the Government's ability to pursue the mortgage as a substitute asset "based on the forfeiture of the $3.1 million." *United States v. Gladstone*, No. 02-16844, slip op. at 5 n.2 (11th Cir. Apr. 15, 2004). This Court also held the District Court's findings that (1) the mortgage was never an asset owned by

Stonewell and (2) Stonewell belonged to Mr. Gladstone and thus was not subject to forfeiture were "not clearly erroneous." *Id.* at 10.

On July 20, 2004, the District Court issued a second amended preliminary order of forfeiture upon application by the Government. The Government's application sought forfeiture of the proceeds of the sale of the Center Mall property based on a substitute assets theory pursuant to 18 U.S.C. § 1963(m).[4] The Government asserted that the proceeds from the Center Mall property should be forfeited as an asset traceable to the sum of $3.1 million ordered forfeited by the jury in Mr. Weiss's criminal trial. The order further declared that any individuals claiming an interest in the proceeds of the sale of the Center Mall property must file petitions within thirty days.

On August 18, 2004, Stonewell, but not Mr. Gladstone, challenged the second amended preliminary order of forfeiture by filing a petition of innocent owner-claim to property ("Stonewell Petition"). Stonewell claimed full ownership of the mortgage and argued that it was entitled to the proceeds of the sale of the Center Mall property.

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[4] Section 1963(m) provides:

If any of the property described in subsection (a), as a result of any act or omission of the defendant—

(1) cannot be located upon the exercise of due diligence;
(2) has been transferred or sold to, or deposited with, a third party;
(3) has been placed beyond the jurisdiction of the court;
(4) has been substantially diminished in value; or
(5) has been commingled with other property which cannot be divided without difficulty; the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

On March 11, 2005, the Government moved for summary judgment on its application for a second amended preliminary order of forfeiture. Its motion was granted by the District Court on May 6, 2005. The District Court concluded that the Government was entitled to the proceeds from the mortgage on the substitute asset theory and entered a second amended preliminary order of forfeiture. The District Court also held that Stonewell lacked standing to bring a petition because (1) the Center Mall mortgage was not an asset of Stonewell and (2) Mr. Gladstone adequately represented Stonewell's interests when he filed the Petition in April 2000. Stonewell has timely appealed from the District Court's judgment.

## C

In a separate action, Donna L. Williams, Insurance Commissioner for the State of Delaware and statutory receiver for NHLIC ("Receiver"), brought a civil action against Mr. Pfeffer and other associates and nominees of Mr. Weiss ("the LPDA defendants") in the United States District Court for the Southern District of New York in April 1996. *See Williams v. LPDA*, No. 96-Civ.-3079 (CLB) (S.D.N.Y. filed April 1996).[5] The suit sought title to various stolen assets, including the Center Mall property. On August 15, 1996, the Receiver filed a notice of *lis pendens* pertaining to the Center Mall property in Monmouth County, New Jersey.

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[5] Due to NHLIC's insolvency, the Delaware Chancery Court entered a Rehabilitation Order, on the Receiver's request, on May 25, 1994, directing the Receiver to take immediate possession and control of all NHLIC assets. On November 21, 1995, the Delaware Chancery Court entered a Liquidation and Injunction Order replacing the Rehabilitation Order. The Liquidation Order authorized the Receiver to sue on behalf of NHLIC and for the benefit of NHLIC's policyholders.

In November of 1997, the Receiver in the *Williams* action sought leave to sell the Center Mall property free of all liens and mortgages based on the Notice of *Lis Pendens* filed in New Jersey. On November 7, 1997, the court in the *Williams* action issued an Order to Show Cause why an order should not be made and entered authorizing the Receiver to: (a) enter into, execute and perform the contract of sale for the Center Point Mall; (b) enter into, execute and perform such other and further agreements and instruments as may be necessary to accomplish the sale of the property; and (c) sell the property free and clear of the Jasper Mortgage which attached to the proceeds of the sale pending the determination of whether this mortgage constitutes a valid and enforceable lien on the property.

On November 13, 1997, Stonewell was notified of the action by copy of the Order to Show Cause. On November 14, 1997, the LPDA defendants in the *Williams* action filed an Opposition to the Receiver's application to sell the property free and clear of all liens. In the opposition, the LPDA defendants argued that allowing the Receiver to sell the property would infringe on the rights of third party mortgagees, such as Stonewell, who were not before the court.

On November 18, 1997, Stonewell filed a non-party memorandum of law in the *Williams* action, in opposition to the Receiver's application to allow the sale of the property free and clear of mortgages. On November 20, 1997, the court in the *Williams* action ordered Stonewell to show cause why an order should not be entered authorizing the Receiver to sell the property free and clear of Stonewell's mortgage, with such mortgage to attach to the proceeds of the sale pending the determination of whether the mortgage constitutes a valid and enforceable lien on the property. On November 20, 1997, oral argument was heard on the Receiver's Supplemental Order to Show Cause. On December 2, 1997, Stonewell filed

a supplemental memorandum of law in opposition to the Receiver's application to allow sale of property free and clear of mortgages in the *Williams* action.

On December 3, 1997, the *Williams* court granted leave to the Receiver to sell the Center Mall property free and clear of all liens and mortgages. On December 4, 1997, in response to a request by counsel for Stonewell, the *Williams* court entered a supplemental order, directing the Receiver to deposit the proceeds of the sale of the Center Mall into an interest bearing escrow account; and that no withdrawals may be made from the escrow account without further order of the Court on notice to the parties to this action and to Stonewell. The Receiver sold the Center Mall for over $2.2 million to CRL Realty Associates, L.P., placing the net proceeds of $1.8 million in an escrow account.[6]

**II**

Stonewell contends, without citing any authority, that this Court lacks jurisdiction to hear this appeal because

> the United States District Court, Southern District of New York, has exclusive jurisdiction over the Proceeds of the Sale of the Center Mall Property which are being held in escrow pending the outcome of the Williams action, and the District Court does not have jurisdiction over them as a matter of law.

"Jurisdictional issues are questions of law which we decide *de novo*." *Malowney v. Fed. Collection Deposit Group*, 193 F.3d 1342, 1346 (11th Cir. 1999).

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[6] On November 20, 2000, the *Williams* court granted Stonewell's motion for an interim stay pending the outcome of the criminal and forfeiture proceedings against Mr. Weiss. Since that date, counsel for Stonewell has filed periodic status reports in the *Williams* matter, updating that court as to the status of these forfeiture proceedings.

Stonewell's contention that the District Court does not have jurisdiction over the proceeds from the sale of the Center Mall property misstates the issue. The instant forfeiture proceedings are not *in rem* proceedings. *United States v. Gilbert*, 244 F.3d 888, 919 (11th Cir. 2001) ("Criminal forfeiture under RICO is *in personam*."). The District Court had jurisdiction over this *in personam* criminal forfeiture proceeding pursuant to 18 U.S.C. § 3231. *See* 18 U.S.C. § 3231 (2000) ("The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."). Section 1963(j) of Title 18 of the United States Code confers jurisdiction upon the District Court to enter orders relating to property subject to forfeiture, without regard to the location of that property.[7] This Court has jurisdiction pursuant to 28 U.S.C. § 1291 (2000).

The *Williams* action, also an *in personam* suit, was filed in the District Court for the Southern District of New York pursuant to that court's diversity jurisdiction under 28 U.S.C. § 1332 (2000). The Receiver for NHLIC brought suit against persons and entities, not property, seeking recovery of funds believed to have been stolen from NHLIC. The fact that the court in *Williams* is exercising control over the proceeds from the sale of the Center Mall property does not transform that suit into an *in rem* proceeding or alter the basis of the court's jurisdiction. *See United States v. $174,206.00 in United States Currency*, 320 F.3d 658, 661 (6th Cir. 2003) (holding that the district court properly exercised jurisdiction

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[7] Section 1963(j) provides: "[t]he district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section."

over a criminal forfeiture action where a state court, in a related state court forfeiture proceeding, had *in personam* jurisdiction over the same currency subject to forfeiture).[8]

## III

The Government contends that this Court does not have jurisdiction to hear this appeal because Stonewell lacks standing to bring a petition of innocent-owner claiming an interest in the Center Mall mortgage. Standing is a threshold issue that is subject to *de novo* review. *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 806 (11th Cir. 1993); *United States v. $38,000 in U.S. Currency*, 816 F.2d 1538, 1543 (11th Cir. 1987). If a claimant lacks Article III standing to challenge a forfeiture, this Court does not have jurisdiction to consider the claim. *$38,000 in US. Currency*, 816 F.2d at 1543 ("It is well established that in order to contest a forfeiture, a claimant first must demonstrate a sufficient interest in the property to give him Article III standing; otherwise, there is no 'case or controversy,' in the constitutional sense, capable of adjudication in the federal courts."). The Supreme Court has instructed that:

> [t]he party invoking federal jurisdiction bears the burden of establishing [standing]. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.

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[8] The procedural effect of a final order and judgment of forfeiture of the Center Mall mortgage, as a substitute asset for the $3.1 million forfeited by the jury in Mr. Weiss's criminal trial, is that the Government will be in a position to seek enforcement of that judgment with the court in the *Williams* action, which is holding the Center Mall property proceeds in escrow, should it choose to do so.

*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citations omitted).

The Government maintains that Stonewell lacks standing to challenge the forfeiture of the Center Mall property proceeds because Stonewell is bound by the District Court's ruling in the Gladstone Petition proceedings that Stonewell never owned the Center Mall mortgage. The government argues that under the doctrine of collateral estoppel, Stonewell is precluded from relitigating issues decided by the District Court when it denied the Gladstone Petition, including the issue of who owned the Center Mall mortgage. The District Court held that the doctrine of collateral estoppel barred Stonewell from relitigating the ownership issue. We review *de novo* a district court's decision about whether collateral estoppel applies. *Quinn v. Monroe County*, 330 F.3d 1320, 1328 (11th Cir. 2003). A "district court's factual determinations underlying its legal conclusion are upheld unless clearly erroneous." *Id.*

"Collateral estoppel bars relitigation of an issue previously decided if the party against whom the prior decision is asserted had 'a full and fair opportunity' to litigate that issue in an earlier case." *Blohm v. Comm'r of Internal Revenue*, 994 F.2d 1542, 1553 (11th Cir. 1993) (quoting *Allen v. McCurry*, 449 U.S. 90, 94-95 (1980)). The party seeking to invoke collateral estoppel must establish that (1) the issue in the pending case is identical to that decided in a prior proceeding; (2) the issue was necessarily decided in the prior proceeding; (3) the party to be estopped was a party or was adequately represented by a party in the prior proceeding; and (4) the precluded issue was actually litigated in the prior proceeding. *Blohm*, 994 F.2d at 1553 (citing *In re Raiford*, 695 F.2d 521, 523 (11th Cir. 1983)).

The issue before the District Court in the Gladstone Petition, the "prior proceeding" for collateral estoppel purposes, was identical to the issue in this case: namely, the ownership of the Center Mall mortgage. In adjudicating the Gladstone Petition, the District Court necessarily decided the ownership issue because it had to determine which assets, if any, Stonewell owned in order to decide whether Mr. Weiss had any interest in Stonewell. In the Gladstone Petition ruling, the District Court determined that Mr. Gladstone, through Stonewell, was acting as Mr. Weiss's nominee. Because a person or entity cannot have a vested interest in property if that person or entity is found to be acting as a nominee for someone whose property is subject to the forfeiture, *Braxton*, 858 F.2d at 652-53 & 653 n.6, the District Court held that Stonewell has no vested interest in the Center Mall mortgage.

The record also demonstrates that the issue was actually litigated in the prior proceeding, as evidenced by the lengthy testimony of Mr. Gladstone and others at the evidentiary hearings held before Magistrate Judge Spaulding. In denying the Gladstone Petition, the District Court held, in part, that:

> [w]ithin the context of the Center Mall mortgage scam, the evidence clearly reflects that Richard Gladstone, through Stonewell Corporation, acted as Sholam Weiss's nominee;
>
> [w]hen Gladstone caused Stonewell to take an assignment of [the Center Mall] mortgage in 1997, he and Stonewell not only acted as another nominee of Weiss, but also Stonewell as assignee stood in the shoes of the assignor and took the mortgage subject to all the defects known to the assignor, in this case Sholam Weiss acting through Jasper and Pfeffer; and,

> . . . the evidence shows that [the mortgage] was not an asset owned by Stonewell. Gladstone, using this corporation, acted as Weiss's nominee to hide Weiss's interest in this mortgage. The asset, the mortgage, was never owned by Stonewell in its own right. Therefore, Stonewell has no standing to contest the Magistrate's finding that the mortgage on, and the proceeds of the sale of, the Center Mall Property should be forfeited to the United States.

In the order on appeal, the District Court concluded that Stonewell lacked standing to claim an interest in the Center Mall mortgage and was collaterally estopped from relitigating the issue of its ownership because

> [t]he issue of the ownership of the Center Mall mortgage was necessarily decided and actually litigated in the proceeding on Gladstone's Petition because it was necessary for the Court to determine the ownership [issue] in determining the ownership of the Stonewell Corporation and the assets of the Stonewell Corporation, and extensive evidence was presented by Gladstone and the Government on these issues.[9]

Additionally, the District Court held that "Stonewell was adequately represented by Gladstone in the earlier proceeding" because Stonewell is a closely held corporation. Mr. Gladstone both alleged in his petition and testified at the evidentiary hearing, held in connection therewith, that he is the sole officer, director and shareholder of Stonewell. Stonewell raised the same allegations in its petition that Mr. Gladstone raised in his petition.

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[9] The jury forfeited Defendant Weiss's interest in the Stonewell Corporation so the District Court had to determine, in the earlier Petition, who owned Stonewell and whether Weiss had an interest in Stonewell.

The District Court addressed the evidentiary issues and correctly concluded that the purported additional evidence Stonewell would present in support of its position was either inadmissible or unpersuasive. For example, the affidavit of Matthew Dollinger, attorney for Stonewell, is inadmissible because it alleges facts about which Mr. Dollinger lacks personal knowledge. Stonewell also offered in support of its petition, the deposition testimony of Isaac Nussen taken in the *Williams* action. Stonewell's counsel admitted, however, that Mr. Nussen's testimony in the *Williams* action was substantially the same as his testimony at the criminal trial, which the Magistrate Judge considered when analyzing the Gladstone Petition.

Stonewell contends that the doctrine of collateral estoppel does not apply to strip it of standing in this case because the District Court's conclusions in deciding the Gladstone Petition are dicta. According to Stonewell, this Court's earlier determination that "the district court had no jurisdiction to award the mortgage to the United States because the jury did not find that the mortgage was forfeit, and the district court did not include the forfeiture of the mortgage in Weiss's sentence" constitutes a "mandate" from the Eleventh Circuit, making the District Court's conclusions in the Gladstone Petition ruling dicta. This argument is not persuasive.

This Court did not issue a "mandate" to the District Court, nor did it conclude that the District Court lacked jurisdiction to determine the ownership of the Center Mall mortgage. Instead, this Court "reverse[d] that portion of the district court's judgment, entered under § 1963,[10] giving the mortgage

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[10] Section 1963(*l*) provides in relevant part:

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that

to the United States."[11] *Gladstone*, No. 02-16844, slip op. at 11. This Court upheld the District Court's finding that Stonewell did not and had not owned the mortgage as "not clearly erroneous," *id.* at 10, and "express[ed] no opinion . . . on the United States's ability to pursue the mortgage based on the forfeiture of the $3.1 million." *Id.* at 5n.2.

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is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury. . . .

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

> (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
>
> (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination. . . .

[11] The special verdict of forfeiture did not specifically find that the mortgage was forfeitable but instead found that "the government has proven . . . that the *defendant's interest* in the following property is forfeitable because the property, Center Mall, Inc., . . . was . . . acquired or maintained in violation of [18 U.S.C. § 1962 and] . . . constituting, or derived from, any proceeds of racketeering" and that $3,100,000 "represents the amount of money involved" in that racketeering activity.

Stonewell also argues that it has standing because, under *Warth v. Seldin*, 422 U.S. 490 (1975), it is entitled to have the court decide the merits of its claim because the invasion of legal rights created by the forfeiture statutes creates Article III standing. *Id.* at 500 (citing *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973) (explaining that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute"); *see also Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972) (White, J., concurring) (explaining that because Congress intended to define standing under the Civil Rights Act of 1964 as broadly as possible under Article III, the Fair Housing Act conferred standing to sue on any resident of the housing unit who had been injured by racial discrimination in the management of the facilities).

These cases do not support Stonewell's theory. While it is true that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute," *Linda R. S.*, 410 U.S. at 617 n.3, "[a] federal court's jurisdiction . . . can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action. . . ." *Warth*, 422 U.S. at 499 (quoting *Linda R. S.*, 410 U.S. at 617). As the Supreme Court pointed out in *Linda R. S.*, "[e]ven though the past law of standing is so cluttered and confused that almost every proposition has some exception, the federal courts have consistently adhered to one major proposition without exception: *One who has no interest of his own at stake always lacks standing.*" *Linda R. S.*, 410 U.S. at 617 n.4 (quoting K. Davis, Administrative Law Text 428-429 (3d ed. 1972)) (emphasis added).

Stonewell has not demonstrated that it has an interest in the Center Mall mortgage and therefore lacks standing to bring this appeal challenging the forfeiture of the proceeds of the sale of the Center Mall property.

This appeal is DISMISSED for lack of jurisdiction.

**Appendix C**

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**ORLANDO DIVISION**

CASE NO. 6:98-cr-99-Orl-19KRS
(Forfeiture)

UNITED STATES OF AMERICA

v.

SHOLAM WEISS

In re: Claim of Petitioner, THE STONEWELL CORP.

**FINAL ORDER OF FORFEITURE**

WHEREAS, on July 19, 2004, 2002, this Court entered a Second Amended Preliminary Order of Forfeitures, pursuant to the provisions of 18 U.S.C. § 1963;

AND WHEREAS, on October 29, November 5 and 12, 2004, in the Orlando Sentinel, a newspaper of general circulation for Orange County, Florida, and on October 29, November 5 and 12, 2004, in the Asbury Park Press, a newspaper of general circulation for Monmouth County, New Jersey, notice of this forfeiture and of the intent of the United States to dispose of the proceeds of the sale of the Center Mall located in Monmouth County, New Jersey, in accordance with the law, and further notifying all third parties of their right to petition the Court within thirty (30) days for a hearing to adjudicate the validity of any legal interests in the subject proceeds;

AND WHEREAS, it appears from the record that the only petition of ownership was filed by The Stonewell Corporation, which petition was denied by virtue of this

Court's May 6, 2005 Order, (Doc. No. 2098) granting the United States' Motion for Summary Judgment on said petition and holding that the United States is entitled to possession, title, and control of the Center Mall mortgage, and by extension the proceeds of the sale of the Center Mall property, free and clear of any claim of Stonewell.

AND WHEREAS, the interest Sholam Weiss in the above-described proceeds has been divested in this criminal forfeiture proceeding;

It is HEREBY ORDERED, ADJUDGED and DECREED:

1. That all right, title and interest to the above-described proceeds is hereby condemned, forfeited and vested in the United States of America as to all parties and shall be disposed of according to law; and

2. That the Internal Revenue Service is directed to dispose of the proceeds according to law.

The Clerk of Court is hereby directed to send copies of this Order to all counsel of record.

DONE and ORDERED this 17th day of May, 2005, at Orlando, Florida.

/s/ Patricia C. Fawsett
PATRICIA C. FAWSETT, CHIEF JUDGE
UNITED STATES DISTRICT COURT

**Appendix D**

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**ORLANDO DIVISION**

Case No. 6:98-cr-99-Orl-19KRS

UNITED STATES OF AMERICA

-vs-

SHOLAM WEISS

Defendant.

In the Claim of the Stonewell Corporation

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**ORDER**

This case comes before the Court on the following:

1. Petition of Innocent Owner of Claim to Property by the Stonewell Corporation. (Doc. No. 2066, filed on August 18, 2004).

2. United States of America's Motion for Summary Judgment and Memorandum of Law. (Doc. No. 2081, filed on March 11, 2005). United States of America's Statement of Uncontested Material Facts in Support of Motion for Summary Judgment. (Doc. No. 2082, filed on March 11, 2005).

3. Stonewell Corporation's Memorandum in Opposition to United States of America's Motion for Summary Judgment. (Doc. No. 2090, filed on April 8, 2005). Stonewell Corporation's Response to United States of America's Statement of Uncontested Facts in Support of Motion for Summary Judgment. (Doc. No. 2091, filed on April 8, 2005). Affirmation of Matthew Dollinger. (Doc. No. 2092, filed on April 8, 2005).

**Background**

Lyle Pfeffer, Michael Blutrich, and Sholam Weiss were partners in crime with an express verbal agreement that money advanced by one would be repaid first and then profits from their frauds would be divided. (Doc. No. 1955, "Order as to Sholam Weiss, Keith Pound Adopting and Approving the Report and Recommendations in Accordance with this Order," filed on October 29, 2002, pp. 5-6). Through the scheme concocted by Weiss, Pfeffer, and Blutrich, millions of dollars were stolen from the National Heritage Life Insurance Company (NHLIC), and these funds were used to perpetuate further frauds. (*Id.* at 6). The Stonewell Corporation, through its officer, director, and shareholder Richard Gladstone, was a late invitee to the frauds, but Gladstone knowingly became involved in the scheme as a cover for Weiss and his money laundering. *(Id.)*

After a nine month trial, a jury convicted Weiss and others of multiple counts of fraud. (Doc. No. 1276, filed on November 2, 1999). The jury also rendered a special verdict of forfeiture for several items of property, including a money judgment of $3,100,000. (*Id.* at 15). The jury forfeited Weiss' interest in several companies, including Center Mall, Inc., Center Point Mall, Inc., Jasper Properties, Corporation, and the Stonewell Corporation (*Id.* at 3, 4, 7, 12).

A Preliminary Order of Forfeiture was entered (Doc. No. 1339, filed on February 4, 2000) and amended (Doc. No. 1445, filed on May 12, 2000). The Court found that by virtue of the Special Verdict of Forfeiture rendered by the jury, the Government was entitled to possession of the Stonewell Corporation and $3,100,000. (Doc. No. 1445, p. 2). The Court also found that all right, title, and interest of Defendant Weiss in the Stonewell Corporation was forfeited to the United States. *(Id.)*

On April 5, 2000, Richard Gladstone filed a "Petition of Innocent Owner-Claim to Property" under 18 U.S.C. section 1963(l). (Doc. No. 1406). Gladstone alleged that he had full and complete ownership of the Stonewell Corporation, that he was the sole shareholder, officer, and director of the Stonewell Corporation, and that the Stonewell Corporation owned a mortgage on the Center Mall. (*Id.* at ¶¶ 2, 23, 27). Gladstone further alleged that a mortgage on the Center Mall property had originally been placed on the property to evidence a loan in the amount of $4,300,000 from the United Jersey Bank, as mortgagee, to Center Mall, Inc., as mortgagor, that the mortgage was transferred by United Jersey Bank to Jasper Properties, Corp. by assignment dated September 7, 1993 and recorded September 13, 1993, and that Jasper Properties, Corp. transferred the mortgage to the Stonewell Corporation by assignment dated March 20, 1997. (*Id.* at ¶¶ 20, 21, 22, 23).

On April 27, 2001, Gladstone filed a Motion for Summary Judgment. (Doc. No. 1761, "Motion by Richard Gladstone for Summary Judgment"). In the Motion for Summary Judgment, Gladstone argued that Stonewell was a bona fide purchaser of the assignment of the Center Mall Mortgage. (Doc. No. 1762, "Memorandum by Richard Gladstone in Support of Motion for Summary Judgment," filed on April 27, 2001, p. 12).

In opposing Gladstone's Motion for Summary Judgment, the Government argued that the Center Mall mortgage was subject to forfeiture because it was the Stonewell asset having a nexus to Defendant Weiss' racketeering activities. (Doc. No. 1775, "United States of America's Memorandum of Law in Opposition to Richard Gladstone's Motion for Summary Judgment," filed on May 25, 2001, pp. 8-9).

Extensive evidentiary proceedings were held before the Magistrate Judge from August 20-23, 2001 (Doc. Nos. 1839, 1840, 1842, 1843), and November 13-14, 2001 (Doc. Nos. 1880, 1883) on Gladstone's Petition of Innocent Owner. Gladstone's opening statement to the Magistrate Judge focused on the circumstances surrounding the acquisition of the Center Mall Mortgage. (Doc. No. 1851, "Transcript of Evidentiary Hearing on Gladstone Forfeiture held on August 20, 2001 before Magistrate Judge Spaulding," filed on October 18, 2001, pp. 11-44). Gladstone explained that the evidence would show that he owned the Stonewell Corporation and was entitled to all of the benefits of ownership of the Stonewell Corporation. (*Id.* at 44). Gladstone also testified that he was the sole officer and shareholder of the Stonewell Corporation. (Doc. No. 1852, "Transcript of Evidentiary Hearing on Gladstone Forfeiture held on August 21, 2001 before Magistrate Judge Spaulding," filed on October 18, 2001, p. 252).

On October 29, 2002, the Court declared that the Government was entitled to possession, title, and control of the Center Mall mortgage. (Doc. No. 1955, p. 29). The Court found that the circumstantial evidence showed that Gladstone, through the Stonewell Corporation, was Weiss' nominee with reference to the Center Mall mortgage acquisition. (*Id.* at 18). The Court also found that the Center Mall mortgage was not an asset owned by Stonewell. (*Id.* at 25). Gladstone, using the Stonewell Corporation, acted as Weiss' nominee to hide Weiss' interest in the mortgage. *(Id.)* Because the mortgage was never owned by the Stonewell Corporation in its own right, it had no standing to contest the finding that the mortgage should be forfeited to the Government. *(Id.)*

On December 17, 2003, Gladstone appealed the Court's October 29, 2002 Order. (Doc. No. 1977). The Eleventh Circuit reversed, finding that the Court overstepped the bounds of its jurisdiction under 18 U.S.C. section 1963(l) by awarding possession of the Center Mall mortgage to the Government. *United States v. Gladstone*, No. 02-16844, slip op. at 10 (11th Cir. Apr. 14, 2003). The Eleventh Circuit held that the Court had no jurisdiction to determine the ownership rights to the mortgage because the jury did not find the mortgage to be forfeit. *Id.* The appellate court explained that a district court has no power to give the Government title to a defendant's interest in forfeited property unless forfeiture has been made part of the defendant's sentence. *Id.* at 8 (citing *United States v. Pease*, 331 F.3d 809, 813 (11th Cir. 2003)). However, the appellate court expressed no opinion on the Government's ability to pursue the Center Mall mortgage based on the forfeiture of the $3,100,000. *Id.* at 5 n.2. The Eleventh Circuit also held that the Court's conclusion that the mortgage was not, and had never been, an asset of the Stonewell Corporation was not clearly erroneous. *Id.* at 10.

On July 20, 2004, on application of the Government, the Court issued a Second Amended Preliminary Order of Forfeiture. (Doc. No. 2065). The Court ordered that all right, title, and interest of Defendant, Sholam Weiss, in the proceeds of the sale of the Center Mall located in Monmouth County, New Jersey was forfeited to the Government for disposition subject to the provisions of 18 U.S.C. section 1963. (*Id.* at ¶ 1). The Court further ordered that any person, other than Sholam Weiss, who has any right, title, or interest in the proceeds of the sale of the Center Mall must file a petition with the Clerk of the United States District Court within thirty days of the final publication of the notice or receipt of the actual notice, whichever is earlier. (*Id.* at ¶ 2).

On August 18, 2004, the Stonewell Corporation ("Stonewell") filed a "Petition of Innocent Owner-Claim to Property," claiming that proceeds of the sale of the Center mortgage are not forfeit and requesting an evidentiary hearing as to whether it had a vested legal right, title, and ownership interest in the proceeds of the sale of the mortgage at the time of the commission of any acts by Defendant Weiss which gave rise to the claim of forfeiture under 18 U.S.C. section 1963. (Doc. No. 2066).

In its Petition, Stonewell raised the same allegations that Gladstone raised in his Petition, including that a mortgage on the Center Mall property had originally been placed on the property to evidence a loan in the amount of $4,300,000 from the United Jersey Bank, as mortgagee, to Center Mall, Inc., as mortgagor, that the mortgage was transferred by United Jersey Bank to Jasper Properties, Corp. by assignment dated September 7, 1993 and recorded September 13, 1993, and that Jasper Properties, Corp. transferred the mortgage to Stonewell by assignment dated March 20, 1997. (Doc. No. 2066, ¶¶ 54, 63, 67, 70, 82). Stonewell contends that it purchased an assignment of the Center Mall mortgage from Jasper Properties, Corp. for valid and sufficient consideration and without any participation or knowledge by Defendant Weiss. (*Id.* at ¶ 108).

On March 11, 2005 the Government moved for summary judgment on the Second Amended Preliminary Order of Forfeiture, arguing that the Order was valid because the Center Mall mortgage is an asset directly traceable to the offense pursuant to 18 U.S.C. section 1963(a) or, alternatively, the mortgage is a substitute asset under 18 U.S.C. section 1963(m). The Government also argues that Stonewell lacks standing to contest the forfeiture of Defendant Weiss' interest in the proceeds of the sale of the Center Mall. Stonewell counters that the Court lacks jurisdiction to adjudicate this claim due to a civil action pending in the United States

District Court for the Southern District of New York and the Eleventh Circuit's opinion in this case and that the findings of fact that the Court previously made in this proceeding are "dicta."[1]

This Order analyzes the issues raises in Stonewell's Petition of Innocent Owner and the Government's Motion for Summary Judgment.

**Standard of Review**

Summary judgment is authorized "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate only

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[1] In opposition to the Government's Motion for Summary Judgment, Stonewell has included the statement of Matthew Dollinger, attorney for Stonewell, the deposition testimony of Isaac Nussen in the Williams action, a civil action in the United States District Court in the Southern District of New York, and a transcript from a Sixty Minutes Interview. (Doc. No. 2092). Dollinger's statement purports to detail alleged facts that occurred in the procurement and assignment of the Center Mall mortgage. Dollinger contends that Gladstone was acting on behalf of Stonewell and was not acting as a nominee for Defendant Weiss. (*Id.* at ¶ 59). Dollinger's statement is not admissible because he is Stonewell's attorney, lacks personal knowledge of the facts asserted in the statement, and was merely reciting what was in the public record. Dollinger's affidavit and argument are based on what an innocent person would find in the public record. They belie the fraud in which the Stonewell Corporation participated as a nominee of Defendant Weiss and are an attempt by Stonewell to disagree with the earlier-made factual findings of the Court. At the hearing on the Government's Motion for Summary Judgment, Dollinger stipulated that Nussen's deposition testimony in the Williams action was substantially the same as Nussen's testimony at the criminal trial which the Magistrate Judge considered when analyzing Gladstone's Petition. The Sixty Minutes interview is not admissible evidence and will not be considered by the Court.

in circumstances where "the evidence is such that a reasonable jury could [not] return a verdict for the nonmoving party." *Id.* The moving party bears the burden of proving that no genuine issue of material fact exists. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986).

In determining whether the moving party has satisfied the burden, the Court considers all inferences drawn from the underlying facts in the light most favorable to the party opposing the motion and resolves all reasonable doubts against the moving party. *Anderson*, 477 U.S. at 255. The Court may not weigh conflicting evidence or weigh the credibility of the parties. *See Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 919 (11th Cir. 1993) (citation omitted). If a reasonable fact finder could draw more than one inference from the facts, and that inference creates an issue of material fact, then the Court must not grant summary judgment. *Id.* (citation omitted)

**Analysis**

The Court will first address Stonewell's arguments that the findings of fact previously made by the Court are dicta, that the Eleventh Circuit's opinion in this case prevents the Government from pursuing the Center Mall mortgage, that the Government abandoned the ability to pursue the mortgage under 18 U.S.C. section 1963(m), and that the Court lacks jurisdiction to adjudicate this dispute. The Court will then analyze whether Stonewell is collaterally estopped from relitigating the issue of the ownership of the Center Mall mortgage and whether Stonewell lacks standing to file the Petition based on the law of the case doctrine. Finally, the Court will determine whether the Center Mall mortgage is forfeit as an asset derived from the proceeds of racketeering activity under 18 U.S.C. section 1963(a) or as a substitute asset under section 1963(m).

Stonewell claims that the evidentiary slate has been wiped clean by its Petition and the Eleventh Circuit's opinion in this case. Stonewell argues that the facts that formed the basis of the Court's October 29, 2002 Order are not applicable to the issues presented in its Petition and that an evidentiary hearing is necessary to collect the facts that form the basis of Stonewell's arguments.

The facts that formed the basis of the Court's Order were the result of a nine month jury trial and subsequent extensive evidentiary proceedings held before the Magistrate Judge from August 20-23, 2001, and November 13-14, 2001, on Gladstone's Petition. Stonewell seeks to relitigate several issues including the source of funds used to purchase the Center Mall mortgage, the circumstances of this acquisition by Jasper Properties and the subsequent transfer to Stonewell, Gladstone's role, through Stonewell, as Weiss' nominee in the transaction, and Stonewell's ownership interest in the Center Mall mortgage.

Stonewell's argument is without merit. The Eleventh Circuit reversed the Court on a narrow issue, finding that the Court erred in giving possession and control of the Center Mall mortgage to the Government because the jury did not find the mortgage to be forfeit. Contrary to Stonewell's contention, the Eleventh Circuit did not throw out the entire evidentiary record. Instead, the appellate court reversed one finding and left undisturbed the other findings of the Court. If accepted by the Court, Stonewell's argument would have the effect of wiping away months of painstaking work on an evidentiary matter that has been presented in Court several times, once to the jury in the criminal case, once to the Magistrate Judge in the forfeiture proceedings, once to the Court in reviewing the Magistrate Judge's Report and Recommendation on Gladstone's Petition, and now again to the Court on Stonewell's Petition and the Government's Motion for Summary Judgment.

Stonewell's argument is also contrary to the public policy reasons behind the law of the case doctrine. When an issue is once litigated and finally decided, that concludes the matter. *United States v. US. Smelting Refining & Mining Co.*, 339 U.S. 186, 198 (1950). The purpose of the doctrine is to "bring an end to litigation by foreclosing the possibility of repeatedly litigating an issue already decided." *Murphy v. F.D.I.C.*, 208 F.3d 959, 966 (11th Cir. 2000). The doctrine is intended to protect traditional ideals such as finality, judicial economy and jurisprudential integrity. *In re City of Philadelphia Litigation*, 158 F.3d 711, 717-18 (3d Cir. 1998). While the doctrine does not apply to every possible issue that a party may raise and is limited to issues previously decided, the law of the case encompasses all things "'*decided by necessary implication* as well as those decided explicitly.'" *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437, 1440 (11th Cir. 1984) (per curiam) (emphasis in original). Findings of fact and conclusions of law by an appellate court are generally binding in subsequent proceedings in the same case. *Burger King Corp. v. Pilgrim's Pride Corp.*, 15 F.3d 166, 169 (11th Cir. 1994).

Reconsideration of a prior holding is not improper, however, if the Court is convinced that the prior decision is clearly erroneous and would work manifest injustice. *Murphy*, 208 F.3d at 966. Given the extensive nine month jury trial, the forfeiture proceedings held before the Magistrate Judge on Gladstone's Petition, the Court's review of the record analyzing the Magistrate Judge's Report and Recommendation, and the Eleventh Circuit's opinion in this case which noted that the factual finding that the Center Mall mortgage was not an asset of Stonewell was not clearly erroneous, it is clear that the law of the case doctrine applies and that the Court's prior decision is neither clearly in error nor the result of manifest injustice.

Stonewell claims that the law of the case doctrine is inapplicable because there is no final decision and because the doctrine only applies to issues of law rather than findings of fact. Contrary to Stonewell's argument, the Eleventh Circuit has clearly stated that the law of the case doctrine applies to findings of fact and conclusions of law. *Burger King Corp.*, 15 F.3d at 169. Stonewell cites *United States v. US. Smelting Refining & Min. Co.*, 339 U.S. 186, 199 (1960), in support of its argument that the instant case represents a non-final decision in which the law of case doctrine is not applicable. *Smelting Refining* is inapposite to the instant case because it involved a temporary injunction rather than the final judgment presented by the Court's October 29, 2002 Order.

Stonewell also argues that the law of the case doctrine is inapplicable because the facts that formed the basis of the Court's October 29, 2002 Order constitute "dicta." The Court's finding that the Center Mall mortgage was not an asset of Stonewell was necessarily subsumed within the Court's analysis of Gladstone's Petition and therefore does not constitute dicta to which the law of the case doctrine would not apply.

Next, Stonewell claims that as a result of the Eleventh Circuit's opinion, the Government is no longer able to pursue the Center Mall mortgage. This is not a correct statement of the case. The Eleventh Circuit specifically stated that while the Court had no jurisdiction to give the Government the mortgage based on the forfeiture of the Stonewell Corporation, the appellate court expressed no opinion on the Government's ability to pursue the mortgage based on the forfeiture of the $3,100,000. *United States v. Gladstone*, No. 02-16844, slip op. at 5 n.2 (11th Cir. Apr. 14, 2003).

Stonewell argues that the Government always claimed that the Center Mall mortgage was forfeit because it was traceable to money Defendant Weiss obtained from racketeering activity. Stonewell contends that the Government was required to seek the Center Mall mortgage's forfeiture in accordance with 18 U.S.C. section 1963(a)(3) and is not entitled to seek the forfeiture of the Center Mall mortgage as a substitute asset under 18 U.S.C. section 1963(m). Because the Government did not initially seek forfeiture of the Center Mall mortgage under 18 U.S.C. section 1963(m) as a substitute asset for the $3,100,000, Stonewell argues that the Government has abandoned the ability to pursue the mortgage under a substitute asset theory. Stonewell cites *United States v. Voigt*, 89 F.3d 1050, 1085 (3d Cir. 1996), and *United States v. Bornfield*, 145 F.3d 1123, 1139 (10th Cir. 1998), in support of its argument. Both are inapposite to the instant case.

In *Voigt*, the defendant was convicted of one count of conspiracy to commit wire fraud, fourteen counts of wire fraud, four counts of money laundering, and two counts of tax evasion. 89 F.3d at 1060. The district court ordered forfeiture of certain pieces of jewelry, reasoning that the jewelry was "traceable to" the proceeds of the money laundering activity. *Id.* at 1060, 1088. The defendant argued that the government failed to prove that the money used to purchase the jewelry was "traceable to" money laundering proceeds, as required by 18 U.S.C. section 982(a)(1). The defendant's argument was based on the fact that the jewelry was purchased with funds drawn from an account in which money laundering proceeds had been commingled with other funds. *Id.* Those funds were diluted by subsequent deposits and withdrawals. *Id.* The defendant claimed that if the jewelry was subject to forfeiture, it was under 21 U.S.C. section 853(p)(5), the substitute asset provision. The government claimed that the "traceable to" and substitute asset

theories merely created alternative paths to forfeiture and argued that criminal forfeiture does not require strict tracing. *Id.* at 1084, 1086.

The Third Circuit held that the substitute asset provision applies only when property cannot be identified as traceable to money laundering. *Id.* at 1086. The appellate court reversed the district court, finding that the government had failed to establish that the jewelry was traceable to the money laundering activity. *Id.* at 1088. The Third Circuit also stated that the government continued to be entitled to $1,600,000 in criminal forfeiture and could pursue the jewelry on the substitute asset theory. *Id.*

Stonewell reads *Voigt* too broadly. Stonewell contends that if the Government seeks forfeiture of property derived from racketeering activity under 18 U.S.C. section 1963(a)(3), then the Government cannot seek forfeiture of that property at a later stage in the proceedings under 18 U.S.C. section 1963(m). However, the Third Circuit in *Voigt* permitted the government to pursue the $1,600,000 on a substitute asset theory. The fact that the district court initially awarded the jewelry on the basis of the "traceable to" theory did not preclude the government from seeking the jewelry on the substitute asset theory.

In *Bornfield*, the jury found that $13,007.42 was involved in the money laundering offense charged in the indictment. 145 F.3d at 1135. The district court entered an order of forfeiture pursuant to 18 U.S.C. section 982(b)(1)(A), 21 U.S.C. section 853(p), and Federal Rule of Criminal Procedure 32(d)(2). *Id.* The Tenth Circuit found that the district court could not grant forfeiture pursuant to the substitute asset provision under 18 U.S.C. section 982(b)(1)(A) and 21 U.S.C. section 853(p). *Id.* at 1138-39. The Tenth Circuit explained that an asset cannot logically be both forfeitable and a substitute asset. *Id.* at 1139. Assets traceable to the

offense are forfeitable once the requisite nexus is established. *Id.* The substitute asset provision allows the forfeiture of assets not already forfeitable when the forfeitable asset is unavailable due to the act or omission of the defendant. *Id.* The district court erred by ordering forfeiture based on the substitute asset provision of the same asset alleged to be forfeitable.[2] *Id.*

*Bornfield* is distinguishable from the instant case. In *Bornfield*, the jury found that the money forfeited was involved in the money laundering offense charged in the indictment. Because of this jury finding, the district court could not order the forfeiture of the money as a substitute asset. An asset is either traceable to the offense or a substitute asset for funds involved in the offense, but it cannot be both. In the instant case, the jury did not find that the Center Mall mortgage was an asset derived from the $3,100,000. Thus, the Government's pursuit of the Center Mall mortgage under a substitute asset theory does not create the logical inconsistency described by the Tenth Circuit in *Bornfield.* Stonewell's argument that the Government abandoned the ability to pursue the mortgage under 18 U.S.C. section 1963(m) is without merit.

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[2] The Tenth Circuit did not find that the asset alleged to be forfeited was actually forfeitable. The Tenth Circuit held that the jury's verdict was clear error due to confusion between the defendant's personal and business accounts. 145 F.3d at 1137. This confusion resulted in either jury instructions that incorrectly identified the defendant's personal account as his business account or an indictment, jury instructions, and special forfeiture order involving the defendant's business account. *Id.* at 1137-38. The jury's verdict was clear error because the jury could not legally order the forfeiture of funds contained in the defendant's business account because the funds in the defendant's business account had no connection to the money laundering offense and were not forfeitable assets. *Id.* at 1138.

Because of a pending civil action in the United States District Court for the Southern District of New York and the Eleventh Circuit's opinion in this case, Stonewell argues that the Court lacks jurisdiction to forfeit Weiss' interest in the Center Mall mortgage to the Government. Both arguments are without merit.

Stonewell contends that the United States District Court in Southern District of New York is the proper court for this action. In April 1996, Stonewell avers that Donna Lee H. Williams, Insurance Commissioner for the State of Delaware, as Receiver for NHLIC, commenced the "Williams Action." According to Stonewell, neither it nor its assignor, Jasper, were named as defendants in that action. In that action, Williams alleged that the defendants engaged in a series of fraudulent transactions and conveyances which resulted in the dissipation and diversion of millions of dollars of assets belonging to NHLIC. Stonewell contends that because the United States District Court for the Southern District of New York has exercised control over the creation of the fund and the distribution of the proceeds of the sale of the Center Mall property, the Court lacks jurisdiction over the forfeiture proceedings in this case.

Stonewell's argument demonstrates a misunderstanding of jurisdictional issues in criminal proceedings. A criminal forfeiture, unlike a civil forfeiture, is an *in personam* proceeding. *United States v. Conner*, 752 F.2d 566, 576 (11th Cir. 1985) (quoting *United States v. L'Hoste*, 609 F.2d 796, 813 n. 15 (5th Cir. 1980)). In an *in rem* proceeding, the forfeiture action is against the property because the property being forfeited is considered the offender. *Id.* By enacting 18 U.S.C. section 1963, Congress "'revised the concept of forfeiture as a criminal penalty against the individual, since the proceeding is *in personam* against the defendant and the forfeiture is part of the punishment.'" *Id.* Pursuant to 18 U.S.C. § 1963(j), the Court has jurisdiction to enter orders

without regard to the location of any property which may be subject to forfeiture or which has been ordered forfeited. 18 U.S.C. § 1963(j). Thus, it is clear that the Court has jurisdiction to determine whether the Government could pursue the mortgage based on the forfeiture of the $3,100,000.

Stonewell also claims that the Court lacks jurisdiction based on the Eleventh Circuit's opinion in this case. The Eleventh Circuit found that the "district court had no jurisdiction to determine the ownership rights to the mortgage because the jury did not find the mortgage to be forfeit, either in its own right or as an asset of the Stonewell Corporation." *United States v. Gladstone*, No. 02-16844, slip op. at 10-11 (11th Cir. Apr. 14, 2003). However, the Eleventh Circuit did not find that the Court lacked jurisdiction to adjudicate whether the Government could pursue the mortgage based on the forfeiture of the $3,100,000. *See id.* at 5, n.2. Thus, the Court now has jurisdiction to determine the ownership of the Center Mall mortgage based on the forfeiture of the $3,100,000.

The doctrine of collateral estoppel prevents Stonewell from relitigating the issue of the ownership of the Center Mall mortgage. The doctrine of collateral estoppel "bars relitigation of an issue previously decided if the party against whom the prior decision is asserted had 'a full and fair opportunity' to litigate that issue in an earlier case." *Blohm v. C.I.R.*, 994 F.2d 1542, 1553 (11th Cir. 1993) (quoting *Allen v. McCurry*, 449 U.S. 90, 94-95 (1980)). In order for a party to be collaterally estopped 1) the issue must be identical in the pending case to that decided in the prior proceeding; 2) the issue must necessarily have been decided in the earlier proceeding; 3) the party to be estopped must have been a party or adequately represented by a party in the prior proceeding; and 4) the precluded issue must actually have been litigated in the first proceeding. *Id.*

The Court must first define the issue that was litigated in the earlier proceeding on Gladstone's Petition. Among the factors to be considered in determining whether the issue in two proceedings is the same are the substantial overlap between evidence and argument and whether new evidence or argument involves application of the same rules of law. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982); *See David Vincent, Inc. v. Broward County, Fla.*, 200 F.3d 1325, 1330 n.7 (11th Cir. 2000) (positively citing the Restatement Second of Judgments for additional definitions of issue preclusion). While Stonewell argues that the issue in the proceeding on Gladstone's Petition was the ownership of Stonewell and not the ownership of the Center Mall mortgage, Stonewell's definition of the issue is too narrow. The jury forfeited Defendant Weiss' interest in the Stonewell Corporation. In order to determine who owned Stonewell and whether Defendant Weiss had an interest in the Stonewell Corporation, it was necessary to analyze the ownership of the mortgage. There has been a full opportunity to litigate the issue of the mortgage ownership because Gladstone's Petition, his Motion for Summary Judgment, the Government's response to Gladstone's Motion for Summary Judgment, Gladstone's opening statement to the Magistrate Judge, the evidentiary proceedings before the Magistrate Judge, and the Court's review of the Magistrate Judge's Report and Recommendation focused on the circumstances surrounding the Center Mall mortgage acquisition. Stonewell has not included any new evidence in response to the Government's Motion for Summary Judgment. Thus, the same issue is presented before the Court in this proceeding as in the prior proceeding on Gladstone's Petition because there is a substantial overlap of evidence and argument and the application of the same rules of law.

The issue of the ownership of the Center Mall mortgage was necessarily decided and actually litigated in the proceeding on Gladstone's Petition because it was necessary for the Court to determine the ownership of the Center Mall mortgage in determining the ownership of the Stonewell Corporation and the assets of the Stonewell Corporation, and extensive evidence was presented by Gladstone and the Government on these issues.

Given the close relationship between Gladstone and Stonewell, Stonewell was adequately represented by Gladstone in the prior proceeding on Gladstone's Petition. Gladstone both alleged in his Petition and testified at the evidentiary proceeding before the Magistrate Judge that he was the sole officer, director, and shareholder of the Stonewell corporation. The Restatement explains that a judgment in an action involving a party who is an officer, director, or stockholder of a corporation generally has no preclusive effect on the corporation itself. RESTATEMENT (SECOND) OF JUDGMENTS §59(3)(b) (1982). However, if the corporation is closely held such that one person holds substantially the entire ownership in it, the judgment in an action against the holder of ownership in the corporation prevents the corporation from relitigating the issue except when relitigation of the issue is justified in order to protect the interest of another owner or a creditor of the corporation. *Id.* at §59(3)(b). In the instant case, Stonewell is a closely held corporation because Gladstone owns all the interest in it, and Stonewell has not demonstrated harm to a creditor of the corporation if it were collaterally estopped. Because Stonewell is a closely held corporation, the Court finds that Stonewell was adequately represented by Gladstone in the earlier proceeding and is collaterally estopped from relitigating the issue of the ownership of the mortgage. *Drier v. Tarpon Oil Co.*, 522 F.2d 199, 200 (5th Cir. 1975) (president and major stockholder was in privity with the corporation because he admitted that he made the ultimate decisions for

the corporation and was the only witness for the corporation in a Louisiana suit); *Pacetti v. United States*, 50 Fed. Cl. 239, 246-47 (2001) (plaintiff adequately represented in earlier proceeding where plaintiff was the president and sole owner of the corporation, appeared as a witness on behalf of the corporation, and maintained a significant degree of control over the corporation); *Aetna Cas. and Sur. Co. of Hartford v. Kerr-McGee Chemical Corporation*, 875 F.2d 1252, 1258-60 (7th Cir. 1989) (explaining that the Kerr-McGee subsidiaries were bound by the results of the Oklahoma litigation brought on their behalf by the subsidiaries' sole shareholder, Kerr-McGee Corporation)

The Government also argues that Stonewell has no standing to contest the forfeiture of the Center Mall mortgage based on the law of the case doctrine and cites to the Court's Order analyzing the Magistrate Judge's Report and Recommendation on the Gladstone Petition in support of its argument. The Court stated:

> "First, the evidence shows that [the Center Mall mortgage] was not an asset owned by Stonewell. Gladstone, using this corporation, acted as Weiss' nominee to hide Weiss' interest in this mortgage. The asset, the mortgage, was never owned by Stonewell in its own right. Therefore, Stonewell has no standing to contest the Magistrate's finding that the mortgage on, and the proceeds of the sale of, the Center Mall Property should be forfeited to the United States." (Doc. No. 1955, p. 25).

The Eleventh Circuit noted that the Court's finding that the mortgage had never been an asset of Stonewell was not clearly erroneous. *United States v. Gladstone*, No. 02-16844, slip op. at 10 (11th Cir. Apr. 14, 2003). Because of the Court's previous finding that Stonewell lacked standing and the Eleventh Circuit's holding that the Court's finding that

the mortgage had never been an asset of Stonewell was not clearly erroneous, the Government argues that Stonewell's Petition must be dismissed as a matter of law.

Stonewell argues that the Court found in its October 29, 2002 Order that it had standing to make a claim to the Center Mall mortgage and cites to the Court's Order in support of its argument:

> "The Court notes that Mr. Gladstone brought his claim in his own right. Stonewell corporation did not file a claim to the mortgage which was the subject of this forfeiture proceeding, although Gladstone claims that Stonewell is a duly formed and existing corporation to which assignment of the mortgage was made. Under these facts, Gladstone has no standing to sue because under the Federal Rules of Civil Procedure '[e]very action shall be prosecuted in the name of the real party in interest.' FED. R. CIV. P. 17(a). It is well established that the assets of a corporation belong to the corporation, even if it has, as in the instant case, only a single shareholder. See, e.g. Carney v. General Motors Corp., 23 F.3d 1154, 1157 (7th Cir. 1994) (holding that a sole shareholder may not bring an action to recover assets that belong to the corporation). Corporate formalities exist to prevent individuals from, for example, co-mingling their personal assets with those of the corporation so that the corporate form does not become a vehicle for fraud. Gladstone's apparent indifference to the requirements of the corporate form reveals much about the nature of Stonewell and Gladstone's relationship to it."

(Doc. No. 1955, p. 27, n. 35).

This portion of the Court's Order does not support Stonewell's argument that the Court found that Stonewell had standing to make a claim to the Center Mall mortgage. Rather, the Court noted that Stonewell should have been the real party in interest in determining whether the Center Mall mortgage was an asset of Stonewell because the assets of a corporation belong to the corporation itself. However, Gladstone pursued title to the mortgage as sole shareholder, officer, and director of Stonewell, showing by implication that Gladstone completely controlled Stonewell. This enabled Gladstone to use Stonewell to conceal the fraudulent schemes of Shalom Weiss. The Court did not object, and the Court subsequently found that the Center Mall mortgage was not an asset of the Stonewell corporation. Thus, Stonewell's argument that the Court found that it had standing is without merit.

In contesting a preliminary order of forfeiture, the filing of third-party claims under 18 U.S.C. section 1963(l)(2) is limited to those parties who have a "legal interest" in the forfeited property. *United States v. Gilbert*, 244 F.3d 888, 910 (11th Cir. 2001). Section 1963(l) limits the grounds upon which a third-party petitioner may rely to establish an interest in property. *Id.* at 911. In order to establish a legitimate entitlement to property, the petitioner must demonstrate that "(1) title to the property was vested in him rather than the defendant at the time of the act which made the property subject to forfeiture; (2) his title to the property was superior to the title held by the defendant at the time of the act which made the property subject to forfeiture; or (3) that he purchased his interest without reasonable cause to know that the property was subject to forfeiture." *Id.* Because of the previous finding that the Center Mall mortgage was not an asset of Stonewell, Stonewell is unable to establish any of the criteria necessary to defeat the Government's entitlement

under the Second Amended Preliminary Order of Forfeiture. Thus, the Court finds that Stonewell lacks standing to claim an interest in the mortgage.

The Court will now analyze whether the Government is able to pursue the Center Mall mortgage based on the forfeiture of the $3,100,000.

The Government seeks to pursue the Center Mall mortgage under two theories. First, the Government pursues the mortgage under 18 U.S.C. section 1963(a)(3) as property derived from proceeds which Defendant Weiss obtained from racketeering activity. Alternatively, the Government pursues the mortgage under 18 U.S.C. section 1963(m) as substitute property for the $3,100,000.

Under 18 U.S.C. section 1963(a)(3), a person convicted of racketeering is required to forfeit any property derived from any proceeds the person obtained, directly or indirectly, as a result of the racketeering activity. 18 U.S.C. § 1963(a)(3). All right, title, and interest in the property vests in the Government upon the commission of the act giving rise to forfeiture. 18 U.S.C. § 1963(c). In reviewing the Magistrate Judge's Report and Recommendation on Gladstone's Petition, the Court found that in September of 1993 Weiss used $3,100,000, which he had stolen from National Heritage Life Insurance Company, to pay for the assignment of the Center Mall mortgage from United Jersey Bank to Jasper Properties Corporation, and Isaac Nussen, George Weisz, and Lyle Pfeffer for Jasper acted as Weiss' nominees in the transaction (Doc. No. 1955, pp. 24-25). Thus, the Court found that the Center Mall mortgage was purchased with money derived from Weiss' crimes. The jury, however, did not make a specific finding that the Center Mall mortgage was subject to forfeiture as property derived from proceeds which Defendant Weiss obtained directly or indirectly from racketeering activity. Because the jury did not make a specific finding that

the Center Mall mortgage was forfeit as property derived from proceeds which Defendant Weiss obtained directly or indirectly from racketeering activity, 18 U.S.C. section 1963(a)(3) is not available as a basis for the Government to pursue the mortgage under a theory of proceeds derived from the $3,100,000.

Even if the jury did not find that the Center Mall mortgage was directly traceable to the $3,100,000 forfeited by the jury, the Government contends that the mortgage would be forfeit under the substitute asset provision of 18 U.S.C. section 1963(m). The jury has no role in determining whether property has been dissipated and whether the Government may seek the forfeiture of substitute assets. *Candelaria-Silva*, 166 F.3d 19, 43 (1st Cir. 1999). The Government may not know that substitution is even necessary until it attempts to take possession of the property specified in the initial forfeiture order. *Id.* (quoting *United States v. Hurley*, 63 F.3d 1, 23 (1st Cir. 1995)).

According to section 1963(m), if any property or interest that the defendant used or acquired in violation 18 U.S.C. § 1962 cannot be located upon the exercise of due diligence, has been transferred or sold to, or deposited with a third party, has been placed beyond the jurisdiction of the court, has been substantially diminished in value, or has been commingled with other property which cannot be divided without difficulty, then the Court shall order the forfeiture of any other property of the defendant up to the value of the property sought.[3] 18 U.S.C. § 1963(m). In other words,

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[3] Section 1963(m) states: "If any property described in subsection (a), as a result of any act or omission of the defendant—

(1) cannot be located upon the exercise of due diligence;
(2) has been transferred to or sold to, or deposited with, a third party;
(3) has been placed beyond the jurisdiction of the court;
(4) has been substantially diminished in value; or

if a defendant has concealed or disposed of "proceeds" of the illegal activity or property "derived from" those proceeds, *any* property of the defendant having an equivalent value is subject to forfeiture whether or not it was acquired from racketeering activity. *Id.*

In *Candelaria-Silva*, the district court ordered forfeiture of the defendant's property as a substitute asset to satisfy, in part, the $6,000,000 money judgment in the preliminary order of forfeiture. 166 F.3d at 42. The First Circuit found that it was not error for the district court to order the forfeiture of other property of the defendant because the record reflected that the government made efforts to locate the proceeds of the conspiracy and concluded that the proceeds were disposed of. *Id.*

In this case, the jury determined that $3,100,000 represented the amount of money obtained by Defendant Weiss or that Defendant Weiss could reasonably foresee would be obtained by other members from the RICO enterprise. (Doc. No. 1276, p. 15). Thus, the jury found that $3,100,000 was the principal asset subject to forfeiture. The forfeiture of the Center Mall mortgage is appropriate as a substitute asset to satisfy the $3,100,000 money judgment if the record reflects that any of the statutory bases of 18 U.S.C. section 1963(m) are met. It is clear that the $3,100,000 cannot be located because Defendant Weiss used the funds to purchase the Center Mall Mortgage which Weiss caused to be transferred from Jasper Properties to Stonewell to conceal his interest in the property. Because the Center Mall mortgage was purchased with the $3,100,000 that the jury forfeited, the

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(5) has been commingled with other property which cannot be divided without difficulty; the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5)." 18 U.S.C. § 1963.

mortgage does not exceed the value of the funds sought by the Government. Therefore, the Government is entitled to the Center Mall mortgage under 18 U.S.C. section 1963(m) as a substitute asset for the $3,100,000.

**Conclusion**

Based on the foregoing, the Court **GRANTS** the United States of America's Motion for Summary Judgment. (Doc. No. 2081). The United States of America is entitled to possession, title, and control of the Center Mall mortgage free and clear of any claim of Petitioner Stonewell Corporation.

**DONE** and **ORDERED** in Chambers in Orlando, Florida this 6th day of May, 2005.

/s/ Patricia C. Fawsett
PATRICIA C. FAWSETT, CHIEF JUDGE
UNITED STATES DISTRICT COURT

Copies furnished to:

Counsel of Record

**Appendix E**

**CORRECTED**

[DO NOT PUBLISH]

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
APRIL 15 2004
THOMAS K. KAHN
CLERK

No. 02-16844

D. C. Docket No. 98-00099 CR-ORL-19-KRS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD GLADSTONE,

Interested Party-Appellant.

No. 03-12264

D. C. Docket No. 98-00099 CR-ORL-19-KRS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD GLADSTONE,

Interested Party-Appellant.

Appeals from the United States District Court
for the Middle District of Florida

(April 15, 2004)

Before EDMONDSON, Chief Judge, DUBINA and COX, Circuit Judges. PER CURIAM:

## I. INTRODUCTION

Richard Gladstone appeals the district court's Final Judgment of Forfeiture entered in the underlying criminal prosecution, *United States v. Sholam Weiss, et al.*, 98-CR-99 (M.D. Fla. filed April 29, 1998). The court entered this judgment, which gave the United States the proceeds of the sale of a mortgage, to effectuate its order on Gladstone's petition filed under 18 U.S.C. § 1963(l). That order declared that the "United States of America is entitled to possession, title, and control of the Center Mall mortgage free and clear of any claim of Stonewell Corporation and Petitioner Richard Gladstone to such asset." (R.5-1955 at 29.) We reverse.

## II. BACKGROUND AND PROCEDURAL HISTORY

Sholam Weiss was an officer of National Heritage Life Insurance Company. Along with other officers, Weiss looted many of the assets of National Heritage. He laundered the money he stole through a series of purchases and resales to corporations set up by nominees which he designated to hold stolen assets for him.[1]

[1] A nominee is "someone designated to act for another as his representative in a rather limited sense." "[I]n its commonly accepted meaning," the term "connotes the delegation of authority to the nominee in a representative or nominal capacity only, and does not connote the transfer or assignment to the nominee of any property in or ownership of the rights of the person nominating him." *United States v. Gilbert*, 244 F.3d 888, 902 n.37 (11th Cir. 2001) (citations and internal quotation marks omitted).

In 1993, some of Weiss's associates defaulted on a loan made to purchase a shopping center, the Center Mall. Weiss paid off the loan for the friends using $3.1 million he had stolen from National Heritage. Weiss took title to the mall, and transferred the title to Center Point Mall, Inc., a company Weiss controlled through his nominee Lyle Pfeffer. Weiss transferred the mortgage to Jasper Properties, Inc., which Weiss also controlled through Pfeffer.

Eventually, Weiss and his cohorts bled National Heritage to insolvency. Donna L. Williams, Insurance Commissioner for the State of Delaware, was appointed receiver of National Heritage, and brought a civil action, *Williams v. LPDA*, No. 96-Civ.-3079 (CLB) (S.D.N.Y. filed April 1996), against Pfeffer and some other Weiss associates and nominees. Williams seized title to the mall, and sold the mall, placing the proceeds in escrow until a court could determine who was entitled to these proceeds.

Around this time, the United States began investigating Weiss for a possible criminal prosecution. Based on the civil suit and the criminal investigation, Weiss and his associates made plans to obscure the property they had acquired with the stolen funds. Particularly, Weiss sought to get the Center Mall mortgage ("the mortgage") away from Pfeffer's corporation, Jasper Properties, Inc.

In 1996, Weiss incurred a $550,000 debt to Richard Gladstone. Weiss and Gladstone agreed on a scheme that would allow Weiss to repay the debt, while hiding the Center Mall mortgage: Gladstone would create a corporation. He would fund the corporation with $450,000. The corporation would pay Weiss $1 million for the mortgage. This sum would be made up of the debt value ($550,000), plus all of Gladstone's investment in the corporation ($450,000). The corporation would hold the mortgage for Weiss. In turn, Weiss would secretly repay Gladstone $1 million.

As planned, Gladstone formed Stonewell, Inc. He and his wife funded Stonewell with $450,000 of their own money, which Stonewell transferred to Weiss. Weiss then assigned the Center Mall mortgage to Stonewell.

On April 29, 1998, the Grand Jury for the Middle District of Florida indicted Sholam Weiss and others, charging violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962, and other criminal statutes, for looting National Heritage. (R.1-1.) The indictment charged, inter alia, that in September, 1993, Weiss and others, through Jasper Properties Corp., bought the mortgage with stolen funds, *id.* at 59, and hid the mortgage by assigning it to a third party who was acting as Weiss's nominee, *id.* at 64. The indictment sought forfeiture, under 18 U.S.C. § 1963, of the proceeds of Weiss's looting, as well as property derived from those proceeds. *Id.* at 161-63. After a trial, a jury found Weiss guilty.

The district court then submitted the question of forfeiture to the jury. On a special verdict form, the jury found:

> that the government has proven, by the standard set forth in the Special Jury Instructions, that the defendant's interest in the following property is forfeitable because the property, Stonewell Corp., item Number 34 was . . . acquired or maintained in violation of Title 18, United States Code, Section 1962 . . . affording a source of influence over the LIFECO Enterprise . . . constituting, or derived from, any proceeds of racketeering.

(R.1-1276 at 12.)[2]

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[2] The jury also found forfeit the $3.1 million which Weiss had stolen and used to buy the Mortgage. (R.1-1276, at 15.) Below, we conclude that the district court had no jurisdiction to give the United States the mortgage based on the forfeiture of Stonewell Corporation. We express no opinion, however, on the United States's ability to pursue the mortgage based on the forfeiture of the $3.1 million.

Pursuant to the jury's forfeiture verdict, the district court entered a preliminary order of forfeiture on February 4, 2000. (R.1-1338.) It stated:

> by virtue of the Special Verdict of Forfeiture, rendered by the jury in the above-styled criminal case, the United States is now entitled to possession of: . . . Stonewell Corp. . . . pursuant to 18 U.S.C. § 1963 and Rule 32(d)(2) of the Federal Rules of Criminal Procedure; It is hereby ORDERED, ADJUDGED and DECREED: . . . That all right, title and interest of defendant, Sholam Weiss, in above-described properties is hereby forfeited to the United States for disposition in accordance with the law, subject to the provisions of 18 U.S.C. § 1963.

*Id.* at 1-2.

On February 15, 2000, the district court sentenced Weiss. Part of his sentence was to forfeit to the United States the items listed in the Preliminary Order of Forfeiture. This is reflected in the district court's criminal judgment against Weiss. (R.1-1372 at 6.)

On April 5, 2000, Gladstone filed a Petition of Innocent Owner under 18 U.S.C. § 1963(l), contesting the forfeiture of Stonewell. (R.2-1406.) Gladstone asserted that he was the owner of all the stock of Stonewell, that Weiss had no interest in Stonewell, and thus that Stonewell should not be forfeited to the United States. He also asserted that at his direction, Stonewell had purchased the mortgage, and that he had no knowledge of any illegal activity of Weiss's concerning the mortgage.

Pursuant to § 1963(l), the district court held a hearing to determine Gladstone's rights to Stonewell. The court determined that Gladstone was entitled to all the stock and assets[3]

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[3] After Weiss's arrest, Gladstone used Stonewell to purchase some shares of common stock of the corporations. The district court found that these

of Stonewell. In the course of the proceeding, the court found that the mortgage was Weiss's property, and had never been an asset of Stonewell. The court then ordered forfeiture of the mortgage to the United States. Gladstone appeals this ruling in appeal 02-16844.

Several months after the district court ordered the mortgage forfeited to the United States, the United States moved for a Final Judgment of Forfeiture giving them the proceeds of the sale of the mortgage. The district court granted the motion by entering a judgment giving the United States the proceeds. Gladstone appeals this judgement in appeal 03-12264, which has been consolidated with appeal 02-16844.

## III. ISSUES ON APPEAL & CONTENTIONS OF THE PARTIES

We address two issues.[4] Gladstone raises the first issue: whether the district court clearly erred in finding that Stonewell Corporation never owned the Center Mall Mortgage. Gladstone contends that it did clearly err, and the United States takes the opposite view.

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stocks were assets of Stonewell, and thus that Gladstone was entitled to them.

[4] Gladstone raises three additional issues, which we need not address: (1) whether the district court erred by stating that Gladstone, rather than Stonewell, lacked standing to bring the § 1963(l) petition, as Stonewell, not Gladstone, was the real party in interest of "the mortgage which was the subject of this forfeiture proceeding," (R.5-1955 at 27 n.35), (2) whether the district court had jurisdiction to enter the Final Judgment of Forfeiture giving the United States the proceeds of the sale of the mortgage, and (3) whether the final judgment of forfeiture violates Gladstone's Fifth Amendment right to Due Process of Law. We do not address these issues because we reverse the court's judgment on other grounds.

We raise the second issue sua sponte: whether the district court had jurisdiction, in the § 1963(l) proceeding, to give the Center Mall mortgage to the United States.

## IV. STANDARDS OF REVIEW

"In the context of third-party claims to criminally forfeited property, we review the district court's factual findings for clear error and its legal conclusions de novo." *United States v. Watkins*, 320 F.3d 1279, 1281 (11th Cir. 2003) (citations omitted).

## V. DISCUSSION

Title 18, U.S.C., Section 1963 sets out a procedure for the United States to seek forfeiture of property which a RICO defendant used in and gleaned from his RICO violation. To have the property forfeited, the United States must first secure a conviction; then it must prove to the defendant's criminal-trial jury that the property described in the indictment is forfeit under § 1963. *See United States v. Gilbert*, 244 F.3d 888, 915, 923 (11th Cir. 2001) (describing the procedure). Once the jury has found the property forfeit, the court must include forfeiture of the defendant's interest in the property as a part of the defendant's sentence. A district court has no power to give the United States title to a defendant's interest in forfeited property unless forfeiture has been made part of the defendant's sentence. *United States v. Pease*, 331 F.3d 809, 813 (11th Cir. 2003). And, absent a waiver of the right to trial by jury, the district court cannot include forfeiture of property in the defendant's sentence unless a jury has found that property to be forfeit. *Gilbert*, 244 F.3d at 915-16 (holding that the district court erred by entering judgment compelling forfeiture of a defendant's interests in a limited partnership, where the jury was never asked to determine whether the limited partnership was forfeit).

Once the property is forfeited by the defendant, through the defendant's sentence, the United States must publish its intent to take title to the property, so that third parties who may have an interest in the property can come forward to protect their interests. *Gilbert*, 244 F.3d at 909-10. Subsection (l) of 1963 provides for this third-party practice. For a court to have jurisdiction to decide ownership of property in a proceeding under 18 U.S.C. § 1963(l), the court must have ordered that property forfeit in the criminal's sentence, based on the jury's finding. *See United States v. BCCI Holdings (Luxembourg), S.A.*, 923 F. Supp. 264, 265 (D.D.C. 1996) (dismissing for lack of subject matter jurisdiction 18 U.S.C. § 1963(l)(2) third-party claim to ownership, because the property that was the subject of the claim had not been included in the court's order of forfeiture).

Here, Weiss's jury found that Weiss's interests in Stonewell Corporation were forfeit. The court included that forfeiture in Weiss's sentence, and the United States published its intent to take title to Stonewell. Pursuant to § 1963(l), Gladstone filed his petition to assert his right to Stonewell. The court held a hearing to determine Gladstone's ownership rights to Stonewell, and found that Gladstone was the rightful owner of Stonewell Corporation, and some of its assets. It also found, however, that Gladstone was not the rightful owner of the Center Mall mortgage, which Gladstone argued was an asset of Stonewell. Instead, the court explicitly found that mortgage was not, and had never been, an asset of Stonewell. (R.5-1955 at 25) ("[T]he evidence shows that this was not an asset owned by Stonewell. Gladstone, using this corporation, acted as Weiss' nominee to hide Weiss' interest in this mortgage. The asset, the mortgage, was never owned by Stonewell in its own right."). This finding was not clearly erroneous: it was amply supported by the testimony of Lyle Pfeffer and Michael Blutrich, Weiss's associates. Thus,

the district court's conclusion that Stonewell belonged to Gladstone, and was therefore not subject to forfeiture, was proper.

But, rather than stopping there, the district court continued on, overstepping the bounds of its jurisdiction under § 1963(l). At the conclusion of the 18 U.S.C. § 1963(l) proceedings, the district court gave the United States the Center Mall mortgage. The district court had no jurisdiction to determine the ownership rights to the mortgage because the jury did not find the mortgage to be forfeit, either in its own right or as an asset of Stonewell Corporation. Indeed, the district court's own finding in the § 1963(l) proceeding was that the mortgage was not an asset of Stonewell.

## VI. CONCLUSION

In appeal 02-16844, Gladstone challenges the district court's awarding the Center Mall mortgage to the United States, at the conclusion of the § 1963(l) proceedings. The district court had no jurisdiction to award the mortgage to the United States because the jury did not find that the mortgage was forfeit, and the district court did not include the forfeiture of the mortgage in Weiss's sentence. Thus, we reverse that portion of the district court's judgment, entered under § 1963, giving the mortgage to the United States.

In appeal 03-12264, Gladstone attacks the district court's Final Judgment of Forfeiture, giving the United States the proceeds of the sale of the mortgage. This judgment was predicated on the court's earlier decision to award the mortgage to the United States. Because we reverse that earlier decision, we vacate the district court's Final Judgment of Forfeiture.

REVERSED.

**Appendix F**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
Apr 15, 2004
THOMAS K. KAHN
CLERK

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No. 02-16844

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District Court Docket No.
98-00099 CR-ORL-19-KRS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD GLADSTONE,

Interested Party-Appellant.

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No. 03-12264

---

District Court Docket No.
98-00099 CR-ORL-19-KRS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD GLADSTONE,

Interested Party-Appellant

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Appeals from the United States District Court
for the Middle District of Florida

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JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

ISSUED AS MANDATE
MAY 14 2004
U.S. COURT OF APPEALS
**[CUT OFF IN ORIGINAL]**

Entered: April 15, 2004
For the Court: Thomas K. Kahn, Clerk
By: Jackson, Jarvis

**Appendix G**

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**ORLANDO DIVISION**

FILED
03 MAR -4 PM 2:58
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

Case No. 6:98-cr-99-Orl-19KRS

UNITED STATES OF AMERICA

v.

SHOLAM WEISS

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**FINAL JUDGMENT OF FORFEITURE**

This matter is before the Court upon the Motion and Brief of the United States For issuance of a Final Judgment of Forfeiture as to the net proceeds of sale of the Center Mall property held by the Receiver in New York in the federal proceeding in the Southern District of New York styled Williams v. LPDA. et al., Case No. 96 Civ 3079 (CLB) (USDC S.D.N.Y.), is now subject to forfeiture to the United States pursuant to 18 U.S.C. § 1963.

WHEREAS, this Court entered a Preliminary Order of Forfeiture on February 4, 2000 and an Amended Preliminary Order of Forfeiture on May 12, 2000; and

WHEREAS, Notice of the Preliminary Order of forfeiture was duly published in the Orlando Business Journal, a newspaper of general circulation, on March 17, 24 and 31, 2000 and in the New York Post, a newspaper of general circulation, on March 30, April 6 & 13, 2000, respectively; and

WHEREAS, on April 5, 2000, Petitioner Richard Gladstone (Gladstone) filed a timely petition alleging an interest through Stonewell Corporation (Stonewell) on real estate known as the Center Mall property located in New Jersey and seeking an amendment of the Amended Preliminary Order of Forfeiture to delete Stonewell from the order of forfeiture; and

WHEREAS, trial on Gladstone and Stonewell's petition was conducted at evidentiary hearings on August 20-23 and November 13-15, 2001; and

WHEREAS, on February 20, 2002, the Magistrate Judge, in a Report and Recommendation (Docket No. 1915), made findings that Gladstone held an interest in Stonewell solely as the nominee for Weiss, that Stonewell was not a bona fide purchaser for value reasonably without notice that the Center Mall mortgage and property was subject to forfeiture and that Gladstone has failed to meet his burden of proof to delete Stonewell from the Amended Preliminary Order of Forfeiture of the listed properties; and

WHEREAS on October 29, 2002, the Court, upon de novo review entered its Order (Docket No. 1955), approving and adopting the aforesaid material finding of the Report and Recommendation and provided additional findings and grounds that Gladstone and Stonewell's petition must be denied as a matter of law.

WHEREAS, the United States, on December 23, 2002 filed its motion and brief for the Issuance of a Final Judgement of Forfeiture (Docket No. 1982). The United States, in its motion, apprized the Court that the Receiver in the Williams v. LPDA action is presently holding the approximate sum of $2,270,709.34 in proceeds from the liquidation of the Center Mall property; that the Receiver in the New York action has obtained an Order by the District Court for the Southern District of New York, hereinafter "New York District Court," on July 5, 2001 authorizing disbursement to the Receiver the sum of $234,000.00 as commission to the Receiver which has yet to be paid and collected by the Receiver; and further advises that the Receiver will in the future seek from the New York District Court an additional disbursement from the proceeds of sale of the Center Mall property of approximately $54,000.00 as attorneys fees which the United States does not oppose.

ACCORDINGLY, after due consideration, it is HEREBY

ORDERED and ADJUDGED the motion (Docket No. 1982) is hereby GRANTED and further

ORDERED and ADJUDGED that the United States has established the requisite nexus for forfeiture as to the net proceeds in liquidation of the Center Mall property held by the Receiver in the federal action in New York styled Williams v LPDA. et al., Case No. 96 Civ 3079 (CLB)(USDC S.D.N.Y.), which is traceable to property acquired by defendant Sholam Weiss, in violation of 18 U.S.C. § 1962.

ACCORDINGLY, the net proceeds in liquidation of the Center Mall Property, after payment of all fees, costs and commissions due the Receiver as authorized and ordered by the New York District Court, is

HEREBY forfeited to the United States of America pursuant to 18 U.S.C. § 1963. It is

FURTHER ORDERED that the United States Treasury Department shall make appropriate disposition of the net proceeds in liquidation of the Center Mall property in accordance with the law.

DONE and ORDERED in Chambers at Orlando, Florida, this 4th day of March, 2003.

/s/ Patricia C. Fawsett
UNITED STATES DISTRICT JUDGE

**Appendix H**

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**ORLANDO DIVISION**

FILED

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CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

CASE NO. 6:98-CR-99-ORL-19KRS

UNITED STATES OF AMERICA

v.

SHOLAM WEISS

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ORDER

After the conclusion of the trial in this criminal case, the jury rendered a special verdict of forfeiture as to Sholam Weiss ("Weiss") in which the following determinations were made:

9. We, the Jury, find that the government has proven, by the standard set forth in the Special Jury Instructions, that the defendant's interest in the following property is forfeitable because the property, Center Mall, Inc., item Number 9 was:

| | | | |
|---|---|---|---|
| a. | acquired or maintained in violation of Title 18, United States Code, Section 1962 | Yes<br>No | X<br>_ |
| b. | affording a source of influence over the LIFECO Enterprise | Yes<br>No | X<br>_ |

| | | |
|---|---|---|
| c. | constituting, or derived from, any proceeds of racketeering | Yes X<br>No _ |

10. We, the Jury, find that the government has proven, by the standard set forth in the Special Jury Instructions, that the defendant's interest in the following property is forfeitable because the property, Center Point Mall, Inc., item Number 10 was:

| | | |
|---|---|---|
| a. | acquired or maintained in violation of Title 18, United States Code, Section 1962 | Yes X<br>No _ |
| b. | affording a source of influence over the LIFECO Enterprise | Yes X<br>No _ |
| c. | constituting, or derived from, any proceeds of racketeering | Yes X<br>No _ |

14. We, the Jury, find that the government has proven, by the standard set forth in the Special Jury Instructions, that the defendant's interest in the following property is forfeitable because the property, Future Diversified Projects Inc., item Number 14 was:

| | | |
|---|---|---|
| a. | acquired or maintained in violation of Title 18, United States Code, Section 1962 | Yes X<br>No _ |
| b. | affording a source of influence over the LIFECO Enterprise | Yes X<br>No _ |
| c. | constituting, or derived from, any proceeds of racketeering | Yes X<br>No _ |

19. We, the Jury, find that the government has proven, by the standard set forth in the Special Jury Instructions, that the defendant's interest in the following property is forfeitable because the property, Jarnow Corp., item Number 19 was:

| | | |
|---|---|---|
| a. | acquired or maintained in violation of Title 18, United States Code, Section 1962 | Yes X<br>No _ |
| b. | affording a source of influence over the LIFECO Enterprise | Yes X<br>No _ |
| c. | constituting, or derived from, any proceeds of racketeering | Yes X<br>No _ |

20. We, the Jury, find that the government has proven, by the standard set forth in the Special Jury Instructions, that the defendant's interest in the following property is forfeitable because the property, Jasper Properties Corp., item Number 20 was:

| | | |
|---|---|---|
| a. | acquired or maintained in violation of Title 18, United States Code, Section 1962 | Yes X<br>No _ |
| b. | affording a source of influence over the LIFECO Enterprise | Yes X<br>No _ |
| c. | constituting, or derived from, any proceeds of racketeering | Yes X<br>No _ |

34. We, the Jury, find that the government has proven, by the standard set forth in the Special Jury Instructions, that the defendant's interest in the following property is forfeitable because the property, Stonewell Corp., item Number 34 was:

| | | |
|---|---|---|
| a. | acquired or maintained in violation of Title 18, United States Code, Section 1962 | Yes X<br>No _ |
| b. | affording a source of influence over the LIFECO Enterprise | Yes X<br>No _ |
| c. | constituting, or derived from, any proceeds of racketeering | Yes X<br>No _ |

(Doc. No. 1276, filed November 2, 1999). A Preliminary Order of Forfeiture was entered (Doc. No. 1338, filed February 4, 2000) and amended (Doc. No. 1445, filed May 12, 2000), forfeiting to the United States all right, title and interest of Defendant Weiss in such properties.

Thereafter Richard Gladstone ("Gladstone") filed a sworn claim titled "Petition of Innocent Owner - Claim to Property" (Doc. No. 1406, filed April 5, 2000) under 18 U.S.C. § 1963(l) in which he asserted, *inter alia*, that as sole shareholder, officer and director of The Stonewell Corporation ("Stonewell"), he had full and complete right, title and interest in such corporation which owned a mortgage on real estate, known as the Center Mall property, located in New Jersey. Id. Gladstone asserted that this mortgage, dated September 6, 1989 and recorded September 12, 1989, had originally been placed on the property to evidence a loan in the amount of $4,300,000 from United Jersey Bank, as mortgagee, to Center Mall, Inc., as mortgagor, that the mortgage was transferred by United Jersey Bank to Jasper Properties, Corp. by assignment dated September 7, 1993 and recorded September 13, 1993, and that Jasper Properties, Corp. had transferred the mortgage to Stonewell by assignment dated March 20, 1997 and recorded March 24, 1997. Id. Gladstone averred that Defendant Weiss had no interest in or control of Stonewell, that Stonewell was a bona fide purchaser for value and without knowledge of any defect in the mortgage, and that his interest in Stonewell and its assets as its sole shareholder, officer and director, was superior to the interest of any other party. Id. Later in the proceedings, Gladstone filed a motion for summary judgment on his claim

of ownership to Stonewell Corporation (Docket Nos. 1761-1763), which was opposed in part by the Government (1774-1779).[1]

The Motion for Summary Judgment was denied in part (Doc. No. 1835, filed August 16, 2001). The Order of Forfeiture was further amended to reflect that the United States was entitled to possession only of the interest of Sholam Weiss in the listed properties (Order ℓ Doc. No. 1835). The case was set for trial before the United States Magistrate Judge, and pretrial memoranda of law were filed (E.g., Doc. Nos. 1801, 1801, 1808, 1825, 1826, 1827).

Trial was held, and the United States Magistrate Judge wrote an opinion recommending that the District Court find that Richard Gladstone had sustained his burden of proof under 18 U.S.C. §1963(l) with respect to his ownership of Stonewell's stock and Stonewell's ownership of its assets except for any interest in the Center Mall mortgage and the proceeds from the sale of the Center Mall property (Doc. No. 1912, filed February 20, 2002). As to the latter, the United States Magistrate Judge found that the interest of Stonewell in the Center Mall mortgage was held as a nominee for Sholam Weiss. Id. Both Gladstone and the Government filed objections and memoranda directed to the Report and Recommendation of the United States Magistrate Judge (Doc. Nos. 1913, 1916, 1917, 1919).

The Court has reviewed *de novo* the entire transcript of the proceedings before the United States Magistrate Judge in this case on the claim of Mr. Gladstone as well as the pleadings, depositions and trial testimony designated by the parties and the exhibits admitted into the record before the U.S. Magistrate Judge.

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[1] The United States conceded that Summary Judgment should be granted in favor of Gladstone with respect to any interest Keith Pound held in Stonewell (Doc. Nos. 1774; 1785).

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Objections of Richard Gladstone

Mr. Gladstone essentially asserts that the conclusion of the Magistrate Judge is not supported by the evidence (Doc. No. 1913). Much of Gladstone's argument is based on testimony of Isaac Nussen, who the evidence showed also acted as a nominee of Sholam Weiss. Gladstone picks and chooses from the testimony, and in some cases takes it out of context, to support his position, and he asks the Court to shut its eyes to the substantial evidence that supports the Magistrate Judge's recommendation.

The sordid tale of a group of people who appeared to spend much of every waking moment scheming to defraud others, and at times each other, and of the people who were knowingly and willingly drawn into various of their schemes, such as Mr. Gladstone, has been told in whole or in part three times now in the course of this case, once to the jury in the criminal proceedings, once to the Magistrate Judge in the forfeiture proceedings, and now again to this Court. Each time the contentions of Mr. Gladstone that his dealings with Mr. Weiss on the Center Mall property were above-board, without knowledge of a fraudulent purpose, and consummated as a bona fide purchaser for value without notice have been rejected.[2]

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[2] The parties stipulated to excerpts from the transcript of the closing arguments in the forfeiture portion of the criminal trial in this case in which Joel Hirshhorn, counsel for Sholam Weiss, stated in part: "Stonewell Corporation. In order for you to enter a verdict of forfeiture as to Stonewell Corporation, you have to totally disbelieve Richard Gladstone and his testimony and the documents which corroborated his testimony that Stonewell Corporation was set up as an entity in connection with the investment that he made when he put $550,000 in." Govt. Exhibit 6, p. 50-51. The jury entered a verdict of forfeiture as to Stonewell Corporation.

Lyle Pfeffer, Michael Blutrich and Sholam Weiss were partners in crime with an express verbal agreement that money advanced by one would be repaid first and then profits from their frauds would be divided as follows: 50% to Weiss, 25% to Pfeffer and 25% to Blutrich (Doc. No. 1853: Pfeffer p. 623-624; 6-107).[3] Through their efforts, millions of dollars were stolen from National Heritage Life Insurance Company (NHLIC), and these funds were used in part to spawn further frauds, some making NHLIC their repeated victim.

Stonewell, through its sole shareholder, Richard Gladstone, was a late invitee to a subset of the frauds perpetrated by this troika, but Gladstone nonetheless wasted no time knowingly becoming involved in the scheme as a cover for Sholam Weiss and his money laundering.

This history of the Center Point Mall scheme is as follows.

In 1989 Isaac Nussen, George Weisz and several other persons were investors through a corporation, Center Mall, Inc., in real estate on which a mall was constructed in New Jersey. Center Mall, Inc. defaulted on a note and mortgage on the property for $4,300,000 to United Jersey Bank. Govt. Exhibit 115; Gladstone Exhibit 72. The Bank sued Center Mall, Inc. and two of the investors who had given guarantees for the note and began foreclosure of the mortgage. In 1993 Nussen and Weisz asked Sholam Weiss to assist in settling the matter before suit and judgment on their personal guarantees occurred. Doc. No. 1899: Schneiderman p. 83-84, 165-178.

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[3] This agreement applied to frauds in which they jointly participated. Mr. Weiss also had independent frauds he simultaneously perpetrated, and Blutrich and Pfeffer also conducted separate frauds. Doc. No. 1864: Blutrich p. 874-875, 883, 914-916; Doc. No. 1899: Blutrich p. 31.

Weiss, who had both civil and criminal legal problems of his own,[4] typically used the *modus operandi* of installing nominees to act as a front in name for Weiss' ownership interests. These nominees often would put in "clean" money to front for and conceal Weiss' ownership interests. Weiss would then surreptitiously repay the nominee for the funds advanced. Doc. No. 1899: Blutrich p. 44; Schneiderman p. 80-81. Weiss' nominees served at his whim. Doc. No. 1899: Blutrich p. 61. To this end Weiss would set up corporations, often with confusingly similar names, and install another person in name only as the corporation's officer, or he would engage persons to pretend to hold ownership of assets which were in fact owned by Weiss. Such persons acted for and at the behest of Mr. Weiss.[5] For instance, Michael Blutrich testified that since Jasper Properties, Corp. was a Weiss controlled corporation, it did not matter who the shareholders were because the pretended owner of shares and the pretended owner of title were mixed and matched at Weiss' whim. Doc. No. 1864: Blutrich p. 939. A parade of these nominees testified at trial, such as Jan Schneiderman, Bernard Shafran, Lyle Pfeffer, Michael Blutrich, and the petitioner here,, Richard Gladstone.[6] The testimony showed that Isaac Nussen and George Weisz also knowingly acted as nominees for Sholam Weiss on occasion.[7] Doc. No. 1853:

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[4] Weiss had been charged with mail fraud in 1992, convicted and sentenced in 1994 and served a prison term. Doc. No. 1899: Schneiderman p. 78-79, 160, 192; Govt. Exhibit 130. His business had been through bankruptcy. Id. at 179.

[5] See, e.g., Doc. No. 1853: Pfeffer p. 611-612; Doc. No. 1854: Pfeffer 804-805; Blutrich p. 879; Doc. No. 1899: Blutrich p. 21-22.

[6] Gladstone denied he acted as Weiss' nominee. His testimony was found not credible on this issue.

[7] Blutrich testified that George Weisz and Isaac Nussen knew that they were committing criminal acts with Sholam Weiss. Doc. No. 1899: Blutrich p. 40. Weiss, Blutrich, Pfeffer, Nussen and Weisz had many substantial conversations about what Mr. Nussen would say to the Grand

Pfeffer p. 679, 683, 690-691; Doc. No. 1854: Blutrich p. 879, 940; Doc. No. 1899: Blutrich p. 30-31. Many of the documents generated with reference to transactions involving Weiss' individual and corporate nominees were shams designed simply to "paper the trail" and obfuscate Weiss' holdings. E.g., Doc. No. 1853: Pfeffer p. 683. It was not Weiss' practice to put in writing the real transaction that was occurring. Doc. No. 1899: Schneiderman p. 220. Further, as noted earlier, Weiss would secretly repay the funds that his nominees were ostensibly advancing in the various transactions that he directed. Doc. No. 1854: Pfeffer p. 829, 839-40.[8]

Weiss settled the dispute with United Jersey Bank for $3,100,000., which Weiss paid from funds he had stolen from NHLIC through South Star, another corporation which he controlled.[9] Weiss received payment from the guarantors

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Jury about who owned what and when, and how he was going to testify about all of the different issues involving Weiss' companies. Doc. No. 1853: Pfeffer p. 683. Earlier in 1996 when Weiss and Pfeffer found out that Pfeffer had forgotten to "collapse" the United Jersey Bank mortgage on the Center Mall property as Weiss had directed him to do at the end of 1993 or early 1994, Weiss, Pfeffer and Nussen, sometimes with Weisz, had a series of meetings about what to do about this mortgage. Doc. No. 1853: Pfeffer p. 686. One of the schemes discussed by Pfeffer and Weiss with Nussen and at times Weisz was to pretend that Weisz and Nussen owned the Jasper mortgage and to act with it accordingly. Doc. No. 1853: Pfeffer p. 686-687.

[8] For instance, Jan Schneiderman testified that she delivered at Weiss' direction $100,000. in cash to Nussen and Weisz in 1995 or 1996 as part of Weiss' interest in Jarnow. Doc. No. 1899: Schneiderman p. 126-127.

[9] Weiss was supposed to recoup the $3,100,00. he put into the property before Pfeffer and Blutrich got paid their share of profits. Blutrich did not learn until later that Weiss had not put his own money into acquiring the United Jersey Bank/Jasper mortgage but instead had used money he had stolen from NHLIC through South Star. Doc. No. 1854: Blutrich p. 874-875, 879, 883.

for release of the guarantees.[10] Doc. No. 1853: Pfeffer p. 604-609; Doc. No. 1854: Blutrich p. 869-870, 875; Doc. No. 1899: Schneiderman p. 83-85, 95; Doc. No. 1900: Schick p. 40-41; Govt. Exhibit 116, 117. Weiss caused the funds to pay for the mortgage to be paid to United Jersey Bank through yet another newly-formed corporation which he controlled, Jasper Properties, Corp., using Jan Schneiderman as his nominee to hide his ownership. Doc. No. 1863: Pfeffer p. 604, 608, 676; Doc. No. 1899: Schneiderman p. 84-91, 183; Doc. No. 1900: Schick p. 43-44, 54. As Weiss directed, the United Jersey Bank assigned the note and mortgage, the judgment it had obtained against Center Mall, Inc. and Meyer and David Rosenbaum, the additional guarantees it held, and all rights and claims it held in the loan, to Jasper Properties, Corp. with Jan Schneiderman acting as Weiss' nominee.[11] Doc. No. 1853: Pfeffer p. 610; Gladstone Exhibit 45-46, 80-82. This assignment of the mortgage on the Center Mall property to Jasper by United Jersey Bank was "without recourse."

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[10] Weiss directed Schneiderman to obtain the $3,100,000. check for this Center Mall closing. Doc. No. 1899: Schneiderman p. 85-86, 95, 188; Govt. Exhibit 116. When Schneiderman acted as Weiss' nominee with reference to Jasper, the actions she performed on Weiss' direction were done with consent of Weisz and Nussen. Doc. No. 1899: Schneiderman p. 225.

[11] The guarantors Nussen and Weisz "paid" Weiss $1,137,500., and three other investors in Center Mall, Inc. paid Weiss $825,000. for a total of $1,962,500. Actually, Sholam Weiss made Nussen and Weisz whole for any monies they laid out. Doc. No. 1853: Pfeffer p. 691, 693-694; Gladstone Exhibit 79; Govt. Exhibit 112. In actuality they personally paid nothing for the assignment of the United Jersey Bank mortgage to Jasper. Doc. No. 1854: Pfeffer p. 817, 839-840; Doc. No. 1899: Schneiderman p. 181-189. For a tortured if not perjurious attempt to explain this transaction, read Isaac Nussen's testimony (Doc. No. 1868; Govt. Exhibit 144) in which he contends Sholam Weiss had nothing to do with Jasper. See also Doc. No. 1869: Bernstein p. 4-22, 54, 55.

Gladstone Exhibit 31. Thereafter Lyle Pfeffer became Weiss' nominee for Jasper Properties, Corp. Doc. No. 1854: Pfeffer p. 790.

Weiss caused the investors in Center Mall, Inc., who were now released from their personal guarantees to the bank, to transfer title to the real property from Center Mall, Inc. to a newly formed corporation, Center Point Mall, Inc., which Weiss controlled through his nominee, Lyle Pfeffer. Government's Exhibit 108.[12] In this manner Weiss caused ownership of the note and mortgage and ownership of the title to the real property to be held by two different corporations, both of which he controlled through nominees. Doc. No. 1853: Pfeffer p. 609. These transfers occurred in 1993, and it is at this time that the Government's right to forfeiture occurred. 18 U.S.C. § 1963(c) ("All right, title, and interest in property [involved in a § 1962 violation] vests in the United States upon commission of the act giving rise to forfeiture under this section."); United States v. Martinez, 228 F.3d 587, 590 (11th Cir. 2000).

Weiss told Pfeffer he did not want the satisfaction of the United Jersey Bank/Jasper mortgage recorded until Pfeffer got rid of the receiver installed on the property by the bank and until he foreclosed on the mortgage to eliminate existing junior mortgages and liens on the Center Mall property. Doc. No. 1853: Pfeffer p. 604, 609, 613, 697. Doc. No. 1854 Blutrich p. 871-873; Doc. No. 1900: Schick p. 52-54; See Gladstone Exhibits 85, 86, 87, 88, 89. This is the foreclosure

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[12] Center Point Mall, Inc. was a wholly owned subsidiary of Future Diversified Projects, Inc. of which Lyle Pfeffer also was "owner" as nominee for Weiss. Future Diversified was made title holder to the Center Mall property as part of a scam on two occasions. Doc. No. 1853: Pfeffer p. 621-623.

Pfeffer forgot to file, and consequently the first discharge of the mortgage was never recorded. Doc. No. 1854: Blutrich 873.

Later when the insurance regulators and auditors were examining the books and records of NHLIC, Weiss, Blutrich, Pfeffer and others involved in the looting of the assets of this company devised a scheme to "cover the hole" in the insurance company's capital or assets occasioned by their theft and conceal it from the regulators. This scheme, referred to as the Capital Properties transaction, involved transferring real property, free of liens, and some mortgages from Future Diversified Projects, Inc., a corporation controlled by Weiss through Pfeffer as his nominee, to LifeCo, Inc., the parent of NHLIC, in exchange for preferred stock in NHLIC issued to Future Diversified Projects, Inc. Docket No. 1851: Shafran p. 314-317; Doc. No. 1853: Pfeffer p. 574; Doc. No. 1854: Blutrich p. 865-879, 941; Doc. No. 1899: Schneiderman p. 95, Govt. Exhibits 17, 109. This scheme was to make it appear that NHLIC had assets to support the false value reflected on its books. Doc. No. 1853: Pfeffer p. 574-577; Doc. No. 1854: Blutrich p. 865-879. To this end Weiss, Blutrich (who was counsel to NHLIC), and Pfeffer caused properties, including the Center Mall property, purchased with funds previously stolen by Weiss from NHLIC, to be transferred to LifeCo.[13] Doc. No. 1853: Pfeffer p. 599-604, 616, 695-697. In order to clean up title on the Center Point Mall, Inc. property, David Schick, a real estate lawyer, was hired. Doc. No. 1899: Schick p. 236-242; Doc. No. 1900: Schick p. 5-26, 84-87. When Weiss and Pfeffer discovered that Pfeffer had forgotten to foreclose on the United Jersey Bank mortgage on the Center Mall property, Jan Schneiderman signed on November 11, 1993 on behalf of

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[13] Weiss, Blutrich, Pfeffer, Isaac Nussen and George Weisz met to plan how to disguise the ownership of the mall in order to perpetrate this fraud on NHLIC. Doc. No. 1853: Pfeffer p. 581-582.

Jasper Properties, Corp., in the presence of attorney David Shick and at the direction of Weiss, a discharge and satisfaction of the Center Mall mortgage (which had been assigned previously from United Jersey Bank to Jasper Properties, Corp.[14] Doc. No. 1900: Schick p. 7-33, 93-94, 97-109. Govt. Exhibit 118; Doc. No. 1899: Schneiderman p. 91-95, 221-223; Doc. No. 1900: Schick p. 29-36. This discharge was notarized by a partner of David Shick, Bernard Shafran, and was supposed to be filed of record. Doc. No. 1900: Schick p.31; Govt. Exhibit 17. All parties to this transaction intended that the Center Mall property would be transferred to LifeCo, Inc. and then to NHLIC with the United Jersey Bank/Jasper mortgage satisfied. (Doc. No. 1851: Shafran p. 285-288). The discharge, however, was not recorded. See Gladstone Exhibit 44.[15]

The assets included in the Capital Properties Transaction were transferred according to this fraudulent plan to LifeCo, Inc. Before the transfer of the Center Mall property, Weiss and Pfeffer caused Center Point Mall, Inc., which held title to the realty on paper, to become a wholly owned subsidiary of Future Diversified Projects, Inc.[16] Both Center Point Mall,

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[14] As noted earlier, when Jasper Properties, Corp. had received the mortgage assignment from United Jersey Bank, Lyle Pfeffer was given the task of getting rid of the trustee whom the bank had caused to be installed, which Pfeffer did, and to eliminate liens and mortgages inferior to the United Jersey Bank mortgage, which Pfeffer forgot to do in the press of dealing with the various mounting lawsuits and governmental investigations into his activities. Doc. No. 1853: Pfeffer p. 613.

[15] Apparently an original discharge of mortgage had been executed in 1993 when United Jersey Bank assigned the mortgage to Jasper, and had been lost, and later the second discharge of mortgage had been executed in November of 1993 as part of the Capital Properties transaction, and had not been recorded. Doc. No. 1899: Blutrich p. 61.

[16] See Govt. Exhibit 14. As part of this transaction.. Weiss directed David Schick to pay George Weisz and Isaac Nussen $700,000. each from Schick's escrow account, the funds from which came from South Star and were stolen from NHLIC. Doc. No. 1900: Schick p. 41, 47, 110-116.

Inc. and Future Diversified Projects, Inc. were controlled by Weiss through Pfeffer as his nominee.[17] Future Diversified Projects, Inc. transferred this property to LifeCo, Inc. by a sale of all the stock in Center Point Mall, Inc., and LifeCo then transferred the property to its subsidiary, NHLIC.[18] Govt. Exhibits 113, 114.

However, when the NHLIC insurance regulators, auditors and accountants began examining these assets, they questioned the transaction and the obvious defects in the titles they found. See Govt. Exhibit 110. They found the United Jersey Bank/Jasper mortgage, the *lis pendens* which had been filed by the Delaware insurance regulators, and the other liens that remained on the Center Mall property. A value of $7 million had been assigned to the Center Mall property in the transfer of it to LifeCo., and Future Diversified had received $7 million in preferred stock for this transfer. Doc. No. 1854: Blutrich p. 77. When NHLIC stopped making payments on the preferred stock, which it had transferred to Future Diversified Projects, Inc. in exchange for transfer of the Center Mall property to LifeCo, Weiss, Blutrich and Pfeffer created a reclaim document, a fraudulent power of attorney, which transferred the Center Mall property back

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[17] Lyle Pfeffer testified that he was 100% shareholder of Future Diversified Projects, Inc. on the face of things, but that he, Weiss, Blutrich, and Patrick Smythe had an interest in such entity. Doc. No. 1853: Pfeffer p. 574-576. David Schick testified that Weiss, Pfeffer and Blutrich controlled all the entities, properties and mortgages being transferred to LifeCo in the Capital Properties Transaction, Jan Schneiderman acted as nominee for most of them, and Blutrich was general counsel to both LifeCo and NHLIC. Doc. No. 1900: Schick p. 37. Schick also testified that while Weiss controlled Jasper, Weiss, Blutrich and Pfeffer were the owners of Jasper. Doc. No. 1900: Schick p. 54. This comports with the agreement Weiss, Blutrich and Pfeffer made for division of the profits of their frauds.

[18] Government Exhibit 113 lists Center Point Mall, Inc. as a wholly owned subsidiary of LifeCo.

from NHLIC to Future Diversified Projects, Inc. Doc. No. 1864: Blutrich p. 883; Doc. No. 1900: Schick p. 38-40; Govt. Exhibit 15.

Meanwhile Pfeffer had been acting as Weiss' nominee for Weiss' 30% interest in a jewelry manufacturing company named Jarnow.[19] Doc. No. 1854: Pfeffer p. 790; Blutrich p. 880. George Weisz and Isaac Nussen technically held the other 70% interest, but they, too, were acting as nominees for Weiss. Doc. No. 1853: Pfeffer p. 637.

In 1996 after the criminal case in Florida began and NHLIC sued Weiss, Pfeffer and Blutrich civilly, Weiss became concerned about his assets held in Pfeffer's name as his nominee. Doc. No. 1854: Blutrich p. 863-864. At that point Weiss, Pfeffer and Blutrich decided to get the assets into the name of another nominee. They first tried to create some false sales, but they were thwarted in this endeavor as to the Center Mall property because of the *lis pendens* which had been filed on it by the insurance regulators. Doc. No. 1853: Pfeffer p. 614, 617, 618; Doc. No. 1854: Blutrich p. 884-888; Govt. Exhibit 18. They also had to deal with the fact that the discharge of this mortgage, which Schneiderman

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[19] In 1993 Weiss asked Pfeffer to act as his nominee in Jarnow to protect Weiss against his civil and criminal problems. Doc. No. 1853: Pfeffer p. 626-634, 686. Pfeffer put $70,000. of his own money into this deal which was to be repaid. Weiss paid for his over $1,000,000. interest in Jarnow with funds that had been stolen from NHLIC. He also caused a loan to be made to Jarnow for several million dollars from funds also stolen from NHLIC. The lender was a corporation called Actual Funding which Weiss controlled. The loan was repaid with interest by Jarnow to Weiss through Actual Funding and another company Weiss controlled called Eurofactors. Payments were also made to Blutrich's trust account and distributed according to Weiss' direction. After Weiss got his money back and Pfeffer got his $70,000. back, the profits were to be split 50/25/25% to Weiss, Blutrich and Pfeffer, respectively, according to their agreement. Doc. No. 1854: Blutrich p. 881.

had executed in the name of Jasper Properties, Corp., had not been filed of record, so the United Jersey Bank/Jasper mortgage was still of record on this property. Id.

Weiss devised several ideas to conceal further his interests in these assets, including his interest in Jarnow and in the Center Mall mortgage, and to remove Pfeffer's name from them. Doc. No. 1853: Pfeffer p. 638-647; Doc. No. 1854: Blutrich p. 863-865, 893-896. Various permutations of these schemes were discussed with Gladstone. Doc. No. 1853: Pfeffer 638-647; Doc. No. 1854: Pfeffer p. 761-762.[20] Gladstone, who was to become substituted for Pfeffer as Weiss' nominee, discussed with Pfeffer his concern whether Weiss would keep his word to return to Gladstone the $450,000. which Gladstone had previously invested with New Contenders for a boxing match and the $550,000. Gladstone was going to front for Weiss for the fraud *du jour* involving the Center Mall mortgage. Doc. No. 1853: Pfeffer p. 641; Doc. No. 1854; Pfeffer p. 761-764, 811. Gladstone also expressed his concern to Pfeffer that if he stepped into Pfeffer's shoes as Weiss' nominee, the same problems Pfeffer was having, i.e., the civil suits and criminal investigations, would follow Gladstone. Doc. No. 1853: Pfeffer p. 641. One of the deals this group considered was to have Gladstone put up $1.5 million as Weiss' nominee with Weiss replacing Gladstone's funds and Pfeffer slowly paying back Weiss each week from another entity so Weiss could launder the funds. Doc. No. 1854: Pfeffer p. 830-833; Blutrich p. 861-863, 864.

However, at the last minute Weiss conceived a different scheme to remove Pfeffer as his nominee and further conceal Weiss' ownership interests. In March of 1997, a two-part deal purportedly occurred, the "swap transaction." The stock in Jasper was "swapped" to Jarnow Corporation for Weiss'

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[20] See Govt. Exhibit 49, p. 101-117.

interest in Pfeffer's name in Jarnow, and Weiss' interest in Jarnow became held by Nussen and Weisz as Weiss' nominees. Doc. No. 1853: Pfeffer p. 643; Doc. No. 1854: Pfeffer p. 792, 799-802; Blutrich p. 896.[21] Similarly the stock in Jarnow was swapped for the stock of Jasper, and Pfeffer remained the "owner" of Jasper as Weiss' nominee. This paper transaction simply further concealed Weiss' interest in and control of these two corporations and added to the paper trail of obfuscation.[22] As part of the "swap", Jasper "divested" itself of Weiss' mortgage. It "assigned" the mortgage on the Center Mall property to Stonewell pursuant to the direction of Weiss so that now Weiss' interest in the mortgage was further concealed and so that Mr. Gladstone through Stonewell became Weiss' nominee title holder of the mortgage instead of Pfeffer acting as officer, director and shareholder of Jasper. Doc. No. 1853: Pfeffer p. 643-646; Govt. Exhibits 34, 35, 36. Blutrich and Weiss typed the documents for these transactions which Pfeffer signed as

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[21] The agreement memorializing this transaction was signed and amended by Weiss and Blutrich, and resigned by the participants months later to create the "paper swap" in order to move the nomineeships for Weiss' interests. Doc. No. 1854: Pfeffer p. 836-838; Blutrich p. 927-928; Govt. Exhibit 33, 129; Gladstone Exhibit 30. Isaac Nussen was involved in the changes. Doc. No. 1854: Pfeffer p. 836-840. Further, Weiss directed Schneiderman in November of 1997 to sign a false affidavit that the discharge of mortgage she had signed in 1993 was signed in error. Doc. No. 1899: Schneiderman p. 97-113.

[22] As a result of this transaction, Weisz and Nussen's nominee positions on behalf of Weiss were switched between corporations. Doc. No. 1864; Blutrich p. 928. Michael Blutrich described this as "Basically, this was just a swing around of Weiss owned and controlled entities." Doc. No. 1864: Blutrich p. 864. Weiss would be responsible for paying back the money Gladstone had advanced (the $450,000. to New Contenders and the $550,000. to Weiss), and Pfeffer and Blutrich would be responsible for repayment of the $1,000,000. in accordance with their agreement for dividing the proceeds of their frauds. Doc. No. 1864: Blutrich p. 864-865, 903.

officer of both Jarnow and Jasper without reading them.[23] Id. Govt. Exhibit 121, 122. Gladstone was present on the day of the "closing" and later acknowledged to Pfeffer that he was stepping into Pfeffer's shoes as Weiss' nominee through Stonewell. Gladstone knew this entire "swap transaction" was controlled by Weiss. Doc. No. 1899: Blutrich p. 68-69. Doc. No. 1853; Pfeffer p. 646-647. Pfeffer testified:

> Weiss told me a series of things. One, he told me he was doing a lot of business with Richard Gladstone having to do with the stock market. Two, he told me that he was covering the $550,000. of Gladstone, that Gladstone was putting up. Three, he told me that he would take care of the $450,000. that was owed to Gladstone and that he would work it out with me and Blutrich on our next deal or however that worked out. It wasn't important to him. It was just important to him to get these assets out of my name because from what he said, the assets are worth, that we're talking about ten million dollars. 450,000. one way or the other wasn't going to make a difference.

Doc. No. 1853: Pfeffer p. 647-648.

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[23] Isaac Nussen and George Weisz confirmed to Lyle Pfeffer that they had been made whole by Sholam Weiss and that they had no capital in Jasper. Doc. No. 1854: Pfeffer p. 839-840. Blutrich testified he explained to Weisz and Nussen, who knew they owned no interest in the United Jersey Bank/Jasper mortgage, that they should sign the papers for this transaction because Pfeffer was in trouble, Weiss did not want Pfeffer to be the named holder of Jarnow shares, Weiss wanted to return the Jarnow shares to Nussen on Weisz with the look of consideration in case Jarnow went public, expanded or became another company, and that this would free up the mortgage so Weiss could use it. Doc. No. 1854: Blutrich p. 906, 929. With this explanation Weisz and Nussen signed the documents knowing they were acting as Weiss' nominees. Id.

After the NHLIC regulators determined that the mortgage on Center Mall had been assigned to Stonewell Corporation and that there had been a previous discharge of this mortgage executed by Jasper, Weiss caused Jan Schneiderman to act on behalf of Jasper to execute a document stating that the discharge and satisfaction of the mortgage had been executed by her by mistake so that the discharge and satisfaction would be a nullity.[24] Doc. No. 1853: Pfeffer p. 651-652; Doc. No. 1864: Blutrich p. 888-893; Govt. Exhibit 53. Schneiderman testified that this discharge document was a sham to keep the United Jersey Bank/Jasper mortgage on the Center Mall property alive. Doc. No. 1899: Schneiderman p. 96-114; Govt. Exhibit 53. The documents created by Weiss and Blutrich as to the swap transaction were pretexts to hide their own and Weiss' interests. Doc. No. 1854: Blutrich p. 896-899, 904-904.

Thus, the United Jersey Bank mortgage, which had twice been previously paid and discharged, once by Weiss in 1993 with $3,100,000. in funds stolen from NHLIC, and once by NHLIC in 1993/1994 for $7,000,000 worth of stock in NHLIC in the Capital Properties transaction, was now "assigned" to Stonewell Corporation.

Within the context of the Center Mall mortgage scam, the evidence clearly reflects that Richard Gladstone, through Stonewell Corporation, acted as Sholam Weiss' nominee.

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[24] This was the discharge Ms. Schneiderman had signed in front of David Schick, which Bernard Shafran notarized, and which had not been filed of record before the earlier Capital Properties transaction. (Doc. No. 1851: Shafran p. 284). Schneiderman testified Weiss drafted the document and threatened her to cause her to sign it. Doc. No. 1899: Schneiderman p. 108-110.

First, there is direct testimony that Gladstone was acting as Weiss' nominee through Stonewell in this "transaction." Doc. No. 1854: Pfeffer p. 807. Pfeffer described direct conversations he had with Gladstone in which before the closing on the "assignment" of the mortgage to Stonewell, Gladstone was apprised of the suits on behalf of the insurance company, the title problems, the lien filed by the insurance regulators on the Center Mall property in favor of NHLIC, and the different legal problems Blutrich and Pfeffer were facing. Doc. No. 1854: Pfeffer p. 833; See Govt. Exhibits 18, 20. In addition, Pfeffer described statements made by Gladstone at meetings when Weiss was moving assets out of Pfeffer's name as Weiss' nominee over to other nominees, including to Stonewell. Gladstone said to Pfeffer "I'm becoming you." Doc. No. 1853: Pfeffer p. 593. Further, Blutrich testified that Weiss told Blutrich that Gladstone was Weiss' nominee after Pfeffer had already told Blutrich the same information. Doc. No. 1854: Blutrich p. 913; Doc. No. 1899: Blutrich p. 43.

Next, the circumstantial evidence shows that Gladstone through Stonewell was Weiss' nominee with reference to the Center Mall mortgage acquisition.

(1) Upon learning that he had invested $450,000. for a boxing match which the borrower, New Contenders, Inc., would not repay, Gladstone did not then make any demand on the guarantors of his loan, Blutrich and Blutrich's company, Scores Entertainment, Inc.[25] Doc. No. 1851: Gladstone

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[25] However, Gladstone testified that be made a claim against Scores in a bankruptcy proceeding for $750,000. Doc. No. 1851: p. 437-441; Doc. No. 1853: p. 563. It appears that Gladstone made a claim and received payment in the Scores' bankruptcy based on a guarantee which he had "transferred" to Jasper and released. This claim in the Scores bankruptcy was apparently settled in March of 2001 for $250,000., although the "documents" for Stonewell's contribution for the assignment of the Jasper/United Jersey Bank mortgage reflect that Gladstone through Stonewell had assigned this Scores guarantee four years earlier in March

p. 424; Doc. No. 1853: Pfeffer p. 597; Doc. No. 1854: Pfeffer p. 763; See Govt. Exhibits 26, 27. Gladstone Exhibit 58-59; But see Govt. Exhibit 49, p. 96; See Govt. Exhibit 77.

(2) Instead, after learning that the persons who induced him to make the original loan, Blutrich and Pfeffer, were being criminally investigated and associated with the Mafia, Gladstone advanced an additional $550,000. on behalf of a corporation, Stonewell, he had formed at Weiss' direction, a person whom he knew was associated with Blutrich and Pfeffer, to acquire a mortgage by assignment from a corporation about which he allegedly knew nothing (except that Lyle Pfeffer was an officer and Michael Blutrich was its attorney) on a commercial property which was in default, was non-performing, and had significant past due taxes accrued. Doc. No. 1851; Deposition of Abato p. 132, 145, 149, 154; Gladstone p. 196-199, 208, 209, 213-216, 384, 391, 424, 425, 429, 453-456; Doc. No. 1853: Gladstone p. 460, 473, 479-80; Gladstone Exhibits 18, 19, 20, 21; Govt. Exhibit 49, p. 56, 120-133, 266-268. Gladstone did this after he had been told of the legal problems certain of the participants in the deal were having and of the *lis pendens* and the title problems with the Center Mall property. Doc. No. 1854: Pfeffer p. 744-745, 761-762; But see Govt. Exhibit 49, p 175.

(3) Gladstone had no previous experience with commercial mortgages or shopping centers. Doc. No. 1851: Gladstone p. 449. Although he had many attorneys he consulted on this deal, including "consulting" with an attorney who told him

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of 1997 to Jasper as consideration for the assignment by Jasper of such mortgage to Stonewell. Government Exhibits 121, 132. Gladstone testified in another proceeding that when Jasper assigned the mortgage to Stonewell in March of 1997, Gladstone released Scores from its guarantee of the $450,000. Govt. Exhibit 49, p. 133-134. Therefore, it appears that he made a false claim in the bankruptcy proceeding based on the contentions he now makes in the instant case.

she had no experience in real estate and with his brother, an attorney, he did not have a thorough examination of the transaction conducted by a real estate lawyer before it occurred.[26] (Doc. No. 1851: p. 150, 152, 155, 442-43.)

(4) Gladstone acted as nominee for Sholam Weiss for other transactions. First, he participated in a sham option to purchase Jan Schneiderman's apartment, so that Weiss could funnel money to her for her attorneys' fees and avoid the appearance of conflict of representation, without revealing that Weiss was the source of payment.[27] Doc. No. 1899: Schneiderman p. 135-143; Govt. Exhibits 133, 135-137, 139-141; Gladstone Exhibit 122. Gladstone wired $25,000. to Ms. Schneiderman's account without ever seeing the condominium or discussing the investment with Schneiderman. Doc. No. 1899: Schneiderman p. 140-143; Doc. No. 1900: Judge p. 139-142. Gladstone never asked Schneiderman to repay him. Doc. No. 1899: Schneiderman p. 143.

Second, he was the vehicle to transfer shares of stock to Joel Hirshhorn, Weiss' attorney in the criminal trial, to be used as collateral for payment to Mr. Hirshhorn for his legal services on behalf of Weiss.[28] Doc. No. 1851: Hirshhorn p. 333-361, Govt. Exhibits 85-88.

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[26] It is noteworthy that Gladstone made no mention at all of Weiss' involvement or participation in negotiating and creating the paper trail for the swing transaction when questioned in his deposition about this event. Govt. Exhibit 49.

[27] Gladstone denied participating in this transaction. Doc. 1853: Gladstone p. 517-524, 568.

[28] Gladstone denied knowledge of this (Doc. No. 1853: Gladstone p. 498-511, 545, 562), contending he signed the certificates on the back and an irrevocable stock or bond power in blank.

Third, there is evidence of record that Weiss and Gladstone held stock for each other and discussed with each other accounting for their holdings at a later time. Doc. No. 1899: Schneiderman p. 119, 121-122, 125.

Finally, Weiss located nominees for an investment Gladstone wanted to make. Weiss assisted Gladstone to purchase stock in a New York bank that was going public using the names of Weiss' relatives as Gladstone's nominees. Doc. No. 1899: Schneiderman p. 122. This was done because the stock offering was limited to current account holders of which Gladstone was not one.

(5) Gladstone maintained a close relationship with Weiss. Numerous telephone calls were exchanged between them even after Weiss had been indicted. Doc. No. 1853: Gladstone, p. 528-536; Govt. Exhibit 43. They participated together in stock deals. Doc. No. 1851: Gladstone p. 397-409; 411-415; Government's Exhibit 49, p. 49-51. Gladstone attended the wedding of Weiss' daughter during the criminal trial. He flew to New York City with Weiss and Schneiderman on a chartered plane during the time of the criminal trial, and on this flight they discussed Gladstone's testimony, apparently in violation of the rule of sequestration. Doc. No. 1853: Gladstone p. 498-99; Doc. No. 1899: Schneiderman p. 123-125. Gladstone also accompanied Weiss to Atlantic City to gamble. See Govt. Exhibit 49, p. 313-318, 320. On Weiss' introduction, Gladstone loaned George Weisz and Isaac Nussen's jewelry company $1,000,000. Govt. Exhibit 49, p. 175-224.

(6) Gladstone's protestations that he consulted his brother and a childhood friend about the value of the Center Mall property do not divert focus from the fact that he was not buying the realty; he was acquiring a mortgage by assignment on the property making Stonewell's title subject

to all defects in title of the assignor(s).[29] But see Govt. Exhibit 49, p. 119-120. See Gladstone Exhibits 24, 23. Gladstone made no effort to trace the assignments of the mortgage or to ascertain if the mortgage had been paid in whole or in part by the various assignees before Stonewell. He did nothing to ascertain the title of Jasper in the mortgage or to investigate if Jasper was active and in good standing.[30] As assignee of the mortgage, Stonewell stood in the shoes of its assignor, Jasper, which had full knowledge of the fraud.

(7) Gladstone's argument that his purchase of title insurance on the mortgage shows he was a good faith purchaser for value without notice is belied by the facts.[31] See Gladstone Exhibit 101. Gladstone was present when Weiss told Blutrich to buy title insurance because of problems with bad publicity, the Grand Jury sitting, the civil cases pending, and the *lis pendens* on the property, and further explained that when the time came that someone examined or contested the assignment of the mortgage to Stonewell, the title company would "take the fall" and not anyone of them in the room. Doc. No. 1854: Blutrich p. 908; But see Govt. Exhibit 49, p. 151-152. Weiss told Blutrich the name of the person to call, which title insurance company

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[29] An undated paper purporting to show rent receipts on the Center Mall property was placed into evidence by Mr. Gladstone. Gladstone Exhibit 49; See Govt. Exhibit 49, p. 134-135.

[30] Jasper, one of the holders in the chain of title to the United Jersey Bank mortgage, had its charter revoked for failure to pay annual reports since March 5, 1996, over one year before the "swap" between Jarnow and Jasper and the assignment of the mortgage to Stonewell. Govt. Exhibits 16,34.

[31] Apparently in the 1993 transaction with United Jersey Bank, a policy of title insurance was issued to Center Point Mall, Inc. Gladstone Exhibit 25.

to use, and directed Blutrich to explain that the *lis pendens* on the Center Mall property did not have to be an exception to the policy because

> a *lis pendens* runs to the real estate and therefore title insurance might have to list a *lis pendens* if the property was being sold, but that because it was a mortgage, a *lis pendens* doesn't run to the mortgage, doesn't affect the mortgage, therefore it need not be placed on the property and it need not be put on the title insurance policy and didn't need to be excepted.

Doc. No. 1854: Blutrich p. 908;[32] See Govt. Exhibit 49, p. 9-12.

Thus, the "title insurance" policy is a red herring because Gladstone had actual knowledge of the facts showing a cloud in title to the mortgage, and, as a consequence, neither he nor Stonewell could have been a bona fide purchaser for value without notice as to this forfeiture proceeding.[33]

(8) As a matter of law, Stonewell is not a bona fide purchaser of the mortgage for value without notice. Since title was acquired by assignment, Stonewell received the mortgage subject to all defects of title in the mortgage pertaining to prior holders who transferred the mortgage by assignment. See Restatement (Second) of Contracts § 317 (1981) (stating that an assignee acquires only the right

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[32] Blutrich thought this was ridiculous, but when he called the man Weiss had designated at the title company, a policy was issued which did not except the *lis pendens*. Doc. No. 1854: Blutrich p. 909-910. Weiss also had a property appraiser he could contact to give an MAI property appraisal, although the man was not an MAI. Doc. No. 1864: Blutrich p. 943.

[33] The entire title insurance policy does not appear to be in the record. There is no evidence of record that Gladstone or Stonewell made a claim on this "policy." Nothing in the case prevents such a claim from being made on the title policy.

or rights transferred to it by the assignor). Not only did Gladstone have actual notice that he was causing Stonewell to be substituted for Jasper and himself to be substituted for Pfeffer as Weiss' nominees, but also he, and therefore Stonewell, had constructive notice of defects in the mortgage. The assignor of the mortgage, Jasper, knew of and participated in the fraud on NHLIC that resulted in the acquisition of the mortgage from United Jersey Bank in 1993. Therefore Jasper's assignee, Stonewell, cannot have an interest in the mortgage that is of a higher quality than that of its assignor.[34]

(9) Weiss told Pfeffer that he was covering the money Gladstone advanced and would make Gladstone whole. Thus even assuming that Gladstone did not have knowledge of the defects in the mortgage (which he did), Gladstone knew the funds he advanced were not actually to acquire the mortgage and that the new money he put up would be protected and repaid surreptitiously by Sholam Weiss.

As to Gladstone's specific objections, the evidence shows the following: (1) in September of 1993, Weiss used $3,100,000., which he had stolen from the NHLIC, to pay for the assignment of the Center Mall mortgage from United Jersey Bank to Jasper Properties Corporation; and (2) Isaac Nussen, George Weisz, and Lyle Pfeffer for Jasper acted as Weiss' nominees in this transaction. Gladstone's argument to the contrary asks the Court to accept the documents at face value and ignore the credible testimony of other insiders to

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[34] Even assuming that Stonewell was defrauded when it acquired the defective assignment, the proper remedy for Stonewell is to sue its assignor for breach of the implied warranty that the assignment contained all the rights that the assignor purported it to contain. See Restatement (Second) of Contracts § 333 (1981) (stating the scope of the implied warranties that are affixed by operation of law to all assignments). It is elementary that the Court cannot simply extinguish the legitimate rights of others who have superior claims to the property that was the subject of the assignment.

Sholam Weiss' frauds and money laundering transactions. When Gladstone caused Stonewell to take an assignment of this mortgage in 1997, he and Stonewell not only acted as another nominee of Weiss, but also Stonewell as assignee stood in the shoes of the assignor and took the mortgage subject to all the defects known to the assignor, in this case Sholam Weiss acting through Jasper and Pfeffer. Gladstone's argument that Schneiderman had no authority to execute a discharge/satisfaction of this mortgage as part of the earlier Capital Properties transaction because Nussen and Weisz did not give her authority is a *non sequitur*. Nussen and Weisz did not give her authority because they had no authority to give. They, and Jasper, were nominees for Sholam Weiss, and it was Weiss who directed Schneiderman to execute the document.

Gladstone argues that the jury verdict forfeiting the interest of Weiss in Stonewell Corporation cannot be construed to mean forfeiture of Weiss' interest in the Center Mall mortgage, an asset of Stonewell, because the verdict form did not target the mortgage as an item of forfeitable property. First, the evidence shows that this was not an asset owned by Stonewell. Gladstone, using this corporation, acted as Weiss' nominee to hide Weiss' interest in this mortgage. The asset, the mortgage, was never owned by Stonewell in its own right. Therefore, Stonewell has no standing to contest the Magistrate's finding that the mortgage on, and the proceeds of the sale of, the Center Mall Property should be forfeited to the United States.

Furthermore, Stonewell's claim to the mortgage fails, not only because it was the nominee for, or alter ego of, Weiss in holding this asset but also because under the facts and by operation of law, Stonewell was not a bona fide purchaser for value without notice and did not acquire the mortgage before the acts giving rise to the forfeiture occurred. The argument that Gladstone did not know the earlier assignment of the

mortgage from United Jersey Bank to Jasper was part of a scheme to defraud NHLIC is irrelevant. He may not have known all the details of an earlier chapter of the frauds, but he did know that he was taking the mortgage with all of its defects, and causing it to be placed in his newly created corporation, Stonewell, as nominee for Sholam Weiss.

For Gladstone to argue that his failure to take steps to secure the asset or pursue foreclosure of the mortgage for two-thirds of a year after the "closing" because of tax reasons, and that he had a belief that the investment was not at risk because there was a judgment related to the debt of record, strains credulity. (Doc. No. 1853: Gladstone p. 475-478). Gladstone had actual notice of the *lis pendens* filed on the property by the insurance regulators before the mortgage assignment from Jasper to Stonewell. It is far more plausible under the evidence that Gladstone took no action to secure the asset because he knew it was parked in Stonewell by Weiss to further conceal Weiss' fraud from the regulators, and no action would be taken unless and until such action was directed by Weiss.

Finally, Gladstone argues, in essence, that forfeiture is precluded by the technicality that the jury's verdict form did not specifically target the mortgage as a forfeitable item, instead referring only to Weiss' interests in Stonewell. This is singularly unpersuasive. The Supreme Court has repeatedly emphasized that RICO is a unique statute and that the intent of Congress was that RICO "shall be liberally construed to effectuate its remedial purpose." Russello v. United States, 464 U.S. 16, 27 (1983). Indeed, RICO is the only "substantive federal criminal statute that contains such a directive." Id. Congress understood that the *modus operandi* of organized crime is to cloak its criminal enterprises in such duplicity and complexity that the efforts of law enforcement and the courts are stymied at every turn. In drafting RICO the way it did, Congress intended to give the courts the flexibility they need

to ensure that the sort of word games that Gladstone wants to play do not defeat the purpose of the law, which is to eradicate criminal syndicates like the one Weiss ran. In Russello, the Court underscored that the forfeiture provision was designed to deter criminal activity by tearing its profits from those who stand to benefit, and courts should not allow procedural technicalities to frustrate this objective. Id. at 28-29.

2. Objections of the Government

As to the United States' objection to the Report and Recommendation, petitioner/claimant Gladstone bears the burden of proof by a preponderance of evidence to establish his legal right, title or interest in the property which is the subject of the forfeiture proceedings.[35] 18 U.S.C. 1963(l)(6). As nominee for Sholam Weiss, Mr. Gladstone himself and through Stonewell has no standing to contest forfeiture of the

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[35] The Court notes that Mr. Gladstone brought his claim in his own right. Stonewell Corporation did not file a claim to the mortgage which was the subject of this forfeiture proceeding, although Gladstone claims that Stonewell is a duly formed and existing corporation to which assignment of the mortgage was made. Under these facts, Gladstone has no standing to sue because under the Federal Rules of Civil Procedure "[e]very action shall be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a). It is well established that the assets of a corporation belong to the corporation, even if it has, as in the instant case, only a single shareholder. See, e.g. Carney v. General Motors Corp., 23 F.3d 1154, 1157 (7th Cir. 1994) (holding that a sole shareholder may not bring an action in his own name to recover assets that belong to the corporation). Corporate formalities such as this exist to prevent individuals from, for example, co-mingling their personal assets with those of the corporation so that the corporate form does not become a vehicle for fraud. Gladstone's apparent indifference to the requirements of the corporate form reveals much about the nature of Stonewell and Gladstone's relationship to it.

Center Mall mortgage, even if he later used such corporation in other contexts, after assignment of the mortgage, for reasons independent of Sholam Weiss.[36]

Pages 26 and 27 of the Report and Recommendation are **CORRECTED** to state that there was a foreclosure judgment instead of a forfeiture judgment.

Page 16 of the Report and Recommendation is **CORRECTED** to state that Blutrich testified that Weiss said to Blutrich and Gladstone that with the bad publicity, grand jury sitting, civil cases pending and *lis pendens* on the property, they should get title insurance on the property so if it was contested, it would be "the title company that takes the fall and not anybody in this room." (Emphasis added).

Any other objections not specifically addressed in this Order are found to be without merit.

CONCLUSION

Except as otherwise stated in this opinion, the Report and Recommendation of the United Magistrate Judge is **ADOPTED AND APPROVED** in accordance with this Order. The United States of America is entitled to possession, title, and control of the Center Mall mortgage free and clear of any claim of Stonewell Corporation and Petitioner Richard Gladstone to such asset.

**DONE AND ORDERED** at Orlando, Florida, this 29th day of October, 2002.

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[36] The evidence reflects that Stonewell was formed for the purpose of taking assignment of the Center Mall mortgage. While there was evidence in the record that Gladstone used Stonewell for stock trading in more recent times, it is noteworthy that Stonewell Corporation's charter was revoked in March of 1998. It apparently was not authorized to do business for failure to pay fees and was reinstated on June 29, 2000. Gladstone Exhibits 13, 38, 39.

/s/ Patricia C. Fawsett

PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to:

Assistant United States Attorney
Attorney for Defendant
United States Marshal
United States Probation
United States Pretrial Services
Defendant

## Appendix I

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**ORLANDO DIVISION**

FILED

2002 FEB 20 PM 3:32

CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

Case No. 6:98-cr-99-Orl-19KRS

UNITED STATES OF AMERICA

-vs-

SHOLAM WEISS, et al.

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In re Claim of Richard Gladstone

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**REPORT AND RECOMMENDATION**

**TO THE UNITED STATES DISTRICT COURT**

This cause came on for consideration after an evidentiary hearing on the Petition of Innocent Owner — Claim to Property filed on behalf of Richard Gladstone pursuant to 18 U.S.C. § 1963(*l*). (Doc. No. 1406). The jury in the underlying criminal case found Sholam Weiss guilty of racketeering, in violation of 18 U.S.C. § 1961, and other crimes. In a special verdict of forfeiture, the jury concluded that Weiss's interests, if any, in Stonewell Corporation and $3.1 million Weiss used to acquire the interest of United Jersey Bank in a mortgage

on property known as the Center Mall (the "Center Mall mortgage") were subject to forfeiture. (Pet. ex. 2 ¶ 34; Doc. No. 1 at 54-68, 139). This Court entered judgment against Weiss forfeiting his interest in this property. (Doc. No. 1372).

The Honorable Patricia C. Fawsett, presiding United States District Judge, entered a final judgment of forfeiture against Weiss as part of the Judgment and Commitment Order. (Doc. No. 1372). She also entered an amended preliminary order of forfeiture that states, in pertinent part, that the United States is entitled to possession of Stonewell Corporation. (Doc. No. 1445). Subsequently, Judge Fawsett entered an order finding that the amended preliminary order of forfeiture "should be amended to only order the forfeiture of whatever interest the Defendant[ ] Weiss ... might have in the properties." (Doc. No. 1835 at 9).

Gladstone, who is the sole shareholder, officer, and a director of Stonewell Corporation ("Stonewell"), filed a claim of ownership to Stonewell and to the assets of Stonewell, including its asserted ownership of the Center Mall mortgage, pursuant to 18 U.S.C. § 1963(*l*).[1] (Doc. No. 1406). I entered a case management and scheduling order based on the proposed schedule filed by the parties. (Doc. No. 1504). Thereafter, the parties filed a number of documents, all of which I have reviewed. I conducted an evidentiary

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[1] Initially, Gladstone contended that the jury's forfeiture decision only forfeited shares of stock in Stonewell. In light of Judge Fawsett's conclusion that the forfeiture also applies to assets of Stonewell (Doc. No. 1835 at 10-11), I will construe the petition to be one made by Gladstone, on behalf of Stonewell, contesting forfeiture of Stonewell's assets.

hearing on Gladstone's claim in August and November 2001. The exhibits admitted at the hearing are described in the agreed exhibits lists. (Doc. Nos. 1884, 1885).[2]

Judge Fawsett referred the petition to me for issuance of a report and recommendation. For the reasons discussed herein, I recommend that the petition be granted in part and denied in part.

## I. STATEMENT OF PERTINENT FACTS.

### *A. Underlying Criminal Activity.*

Much of the testimony at the evidentiary hearing described the underlying criminal activity of which Weiss was convicted. Because the Court is well aware of that activity, I will only summarize it.

The Work-Out of the Center Mall Mortgage.

Issac Nussen and George Weisz had worked together in the jewelry business since 1970. (Nussen Testimony, Pet. Ex. 136, at 22812-13).[3] In 1989, Nussen, Weisz and others, who were owners of Center Mall, Inc., borrowed $4.3 million from United Jersey Bank/Central, N.A. ("United Jersey

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[2] During the hearing, I ruled on the admissibility of a number of exhibits offered by the parties. Near the end of the hearing, the parties reached an agreement pursuant to which they withdrew some exhibits and agreed on the admission of other exhibits. I accepted the parties' agreement and permitted exhibits to be admitted or withdrawn as agreed. To the extent that the parties' agreement differed from my earlier rulings on the admissibility of exhibits, my earlier rulings were withdrawn. (Doc. No. 1892 at 2-3).

[3] The parties agreed that excerpts of Nussen's trial testimony would be admitted as exhibits. Petitioner's exhibit 136 contains the excerpts of Nussen's trial testimony, including portions of both direct and cross-examination, designated by Gladstone. The United States submitted the entire cross-examination of Nussen, which is contained in government exhibit 144.

Bank") to build a shopping mall on real property in Monmouth County, New Jersey. (*Id.* at 22817-19, 22878-82).[4] The real estate and shopping mall were mortgaged to United Jersey Bank as collateral for the loan, and Nussen, Weisz, and David and Meyer Rosenbaum ("the Rosenbaums") personally guaranteed repayment of the loan. (*Id.* at 22878-82).

The construction of the mall exceeded the original cost estimates, resulting in the owners of Center Mall, Inc. having to contribute additional money above the amount borrowed. *(Id.)*. They had problems renting the space in the mall. As a result, they failed to make mortgage payments to United Jersey Bank as required. *(Id.)*.

By letter dated December 2, 1992, United Jersey Bank informed the borrowers that the loan had matured, and it demanded payment of the principal and accrued unpaid interest. (Pet. ex. 72). When payment was not received, United Jersey Bank filed an action in chancery to foreclose on the real property known as Center Mall[5] and an action at law against Center Mall, Inc. and the Rosenbaums to collect the money owed to United Jersey Bank. (Pet. exs. 76, 81). A foreclosure order was entered. (Pet. ex. 46). The chancery court appointed a receiver to collect rent payments from the Center Mall tenants. (Pet. exs. 85-90). A judgment was entered against Center Mall, Inc. and the Rosenbaums in the amount of $4,588,651,651.79, which consisted of the principal sum of

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[4] The other owners of Center Mall, Inc. were David and Meyer Rosenbaum, Zigmond Brach, and Isac Weiss. (Nussen Testimony at 22818-19, 22878-82; Pet. exs. 72, 81, 85). Nussen, Weisz, and Isac Weiss collectively owned 25% of Center Mall, Inc. (Nussen Testimony at 22818-19).

[5] The mall is also referred to as the East Pointe Center. (*See, e.g.*, Pet. ex. 87). I will refer to it throughout this report as the Center Mall.

the mortgage plus accrued interest and late fees. Center Mall, Inc. and the Rosenbaums were also required to pay United Jersey Bank its attorneys' fees and costs. (Pet. ex. 45).

Nussen met Sholam Weiss sometime in 1992. (Nussen Testimony at 22815-16). He learned that Weiss helped people work out business problems, including problem loans. (*Id.* at 22817-18). He approached Weiss and asked for his assistance in working out the debt Center Mall, Inc. owed to United Jersey Bank. (*Id.* at 22882-84).

Weiss negotiated an agreement under which United Jersey Bank would assign the mortgage on the Center Mall property and the judgments United Jersey Bank had against the Rosenbaums to Jasper Properties Corporation ("Jasper") in exchange for a payment of $3.1 million. (*Id.* at 22886-88). Nussen and Weisz agreed to pay $1.1375 million, in exchange for which they would own the Center Mall mortgage. (*Id.* at 22894-99). Lyle Pfeffer, a person who Weiss had introduced to Nussen, was to pay $1.1375 million, in exchange for which he would own the Center Mall property. (*Id.* at 22890-99). The Rosenbaums and Brach were also to contribute money. (*Id.* at 2289-93).

Nussen testified that he caused Jasper to be formed to acquire the assignment of the mortgage from United Jersey Bank, but he did not produce stock certificates, tax returns or other indicia of his ownership in Jasper. (*Id.* at 22899-903; Gov't ex. 144 at 23228-32). Nussen testified that he and Weisz were the shareholders in Jasper. (Nussen Testimony at 22899-903). However, Michael Blutrich testified that Jasper was controlled by Sholam Weiss. (TR. 939-40). Jan

Schneiderman also testified that Weiss created Jasper solely for the purpose of acquiring the Center Mall mortgage. (Doc. No. 1899 at 90[6]).

Brian Bernstein, an attorney, closed this transaction with United Jersey Bank on behalf of Jasper. (Nussen Testimony at 22894-99). Schneiderman signed closing documents as an officer of Jasper, although she had no interest in or decision-making authority over that corporation. (*Id.* at 23470-71). Nussen caused $1,136,970 to be wire transferred to Bernstein's escrow account to pay his and Weisz' portion of the $3.1 million due to United Jersey Bank. (*Id.* at 22904-06; Pet. ex. 79). Sholam Weiss gave Bernstein a check in the amount of $3.1 million payable to United Jersey Bank, which money the criminal jury found Weiss had fraudulently obtained from NHLIC (TR. 607, Nussen Testimony at 22904-06; Pet. ex. 2 ¶ 42; Pet. ex. 79). Bernstein distributed the funds in his escrow account that had been paid by Nussen to Sholam Weiss. (Pet. ex. 79).

The Center Mall mortgage was assigned to Jasper on September 7, 1993. (Pet. exs. 82, 87). Jasper and United Jersey Bank agreed that the receivership for the Center Mall should be terminated. The receiver made a final accounting and obtained permission from the chancery court to turn over monies it held to Jasper. (Pet. exs. 87, 90). The deed to the Center Mall property was transferred to Center Point Mall, Inc., of which Future Diversified Projects, Inc. ("Future Diversified") was the sole shareholder. (Gov't exs. 14, 108). Pfeffer was the president and sole shareholder of Future Diversified. (TR. 575).

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[6] The page numbers in the transcript for the evidentiary hearing conducted on November 13, 2001 and November 14, 2001 each begin with page 1, rather than being consecutively numbered to follow the previous transcripts. I will refer to these transcripts by their respective docket numbers: the November 13, 2001 transcript is Doc. No. 1899, and the November 14, 2001 transcript is Doc. No. 1900.

Pfeffer and Schneiderman admitted that they acted at the direction of, and as the nominees for, Sholam Weiss (TR. 611-12, 627-28; Doc. No. 1899 at 81, 183) in this and various other transactions. Blutrich also testified that Weiss controlled the entities and individuals involved in the assignment of the Center Mall mortgage. (TR. 873-74, 879).

The Capital Properties Transaction.

Subsequently, as part of the continuing scheme to defraud NHLIC, Sholam Weiss and others assembled a group of assets that were to be transferred to NHLIC or its affiliates in exchange for stock in LifeCo Investment Group, Inc. ("LifeCo"), NHLIC's parent company. (TR. 574-75, 599, 622, 865-67; Gov't ex. 109). These assets, sometimes referred to as the Capital Properties, included the Center Mall and the land on which it was located. (TR. 579). The agreement with NHLIC was that the Center Mall was to be transferred to NHLIC or its affiliates free and clear of any mortgages. (TR. 600-02, 616, 873, 941; Doc. No. 1900 at 5-7; Gov't ex. 109).

On November 11, 1993, Schneiderman, acting as Secretary of Jasper at Sholam Weiss's instruction, signed a discharge of the Center Mall mortgage. (TR. 283-86; Doc. 1899 at 93; Gov't ex. 53). The discharge was never recorded in the records of Monmouth County, New Jersey. (TR. 325; Doc. No. 1900 at 32)[7].

[7] Weiss told Pfeffer that he did not want the discharge of the Center Mall mortgage to be recorded. (TR. 608; *accord* TR. 871-72). He instructed Pfeffer, acting on behalf of Jasper, to execute on the foreclosure judgment against the Center Mall property, the effect of which would be to extinguish a second mortgage on that property. (TR. 599, 604, 609, 686-87). Pfeffer never completed the foreclosure. (TR. 612-13, 686-87, 873).

Center Point Mall, Inc. conveyed title to the Center Mall property to LifeCo in a deed dated November 15, 1993. (Gov't ex. 113). The title insurance policy obtained for the transfer of the Center Mall reflected that the mortgage, which was then held by Jasper, was still outstanding. (Pet. ex. 25, Schedule B ¶ 2).

In a recorded document dated December 30, 1993, Lambert G. Aloisi, then President of NHLIC, conveyed the Capital Properties, including the Center Mall property, from NHLIC to Future Diversified. (TR. 575-77, 622-23, 883-84; Gov't ex. 15).

Donna Lee H. Williams, the Insurance Commissioner for the State of Delaware, was appointed the receiver of NHLIC after it became insolvent. In 1996, she filed a civil action against Future Diversified, Pfeffer, Blutrich, and others, in which she alleged that the transfer of the Center Mall property from NHLIC to Future Diversified was fraudulent. (Gov't ex. 19 [referred to by the parties as *Williams v. LPDA*]). She caused a Notice of Lis Pendens to be recorded in the Monmouth County property records. The Notice of Lis Pendens states, in pertinent part, that the general object of the civil action was to affect the title to the Center Mall property. (Gov't ex. 18). Neither the civil complaint nor the Notice of Lis Pendens refers to any mortgages on the Center Mall property.

After the *Williams v. LPDA* litigation began, Weiss, Pfeffer and Blutrich discussed creating fictitious sales to move property they held into the names of other people. (TR. 614, 863-64). They knew that there was a *lis pendens* encumbering the real property on which the Center Mall was located. (TR. 617). In July 1996, they learned that the discharge of Center Mall mortgage had never been recorded. (TR. 618, 887-88, 892-93).

Subsequently, the signed but unrecorded discharge of the Center Mall mortgage was discovered by the litigants in *Williams v. LPDA*. (TR. 650-51). At Weiss's instruction, Schneiderman prepared an affidavit falsely stating that the discharge had been signed in error. (TR. 652; Doc. No. 1899 at 97-102; Gov't ex. 53).

The Center Mall was sold by Order of the United States District Court for the Southern District of New York. After payment of real estate taxes and fees to the receiver, approximately $1,800,000 of the sales proceeds plus accrued interest remain. (Joint Final Pretrial Statement at 24, Doc. No. 1808). Gladstone asserts that this money belongs to Stonewell in partial satisfaction of the Center Mall mortgage.

The Jarnow/Jasper Swap.

In 1993, Nussen and Weisz formed Jarnow Corporation ("Jarnow"), which was in the business of manufacturing gold jewelry. (Nussen Testimony at 22812-15). In September 1993, Pfeffer, acting as a nominee for Weiss, established a $5 million line of credit for Jarnow, in exchange for which he, acting as a nominee for Weiss, acquired 30% of the shares of Jarnow. (TR. 627-28, 634-35, 880-81; Nussen Testimony at 22899-903).

On March 19, 1997, Nussen, Weisz, and Pfeffer agreed that Nussen and Weisz would transfer their shares in Jasper to Pfeffer and Pfeffer would, in return, transfer his shares in Jarnow to Nussen and Weisz. (TR. 638, 640; Nussen Testimony at 22929-37, 23576). Pfeffer signed documents prepared by Blutrich and presented to him by Weiss to effectuate the stock swap. (TR. 643-45, 896-97; Gov't ex. 129). Pfeffer testified that the agreement memorializing this transaction (Gov't ex. 33) was signed, amended, and resigned many times. (TR. 836-37). The purpose of the document was merely to disguise the transfer of nominee ownership in these companies. (TR. 836-38, 863-64, 898-99, 928).

*B. Transactions with Richard Gladstone and Stonewell Corporation.*

Background of Richard Gladstone.

Richard Gladstone received a B.A. degree from Emory University in 1979. He is married to Lauri Doll Gladstone. They have two children. (TR. 160). He works as an entrepreneur, including investing privately and publicly in securities. (TR. 64, 160). He also created a travel business, called Sterling Travel, which was a travel agency used by independent travel consultants and others. (TR. 160-61, 163). In 1996, he had income from investments of approximately $1.4 million. (TR. 63). In 1997, Gladstone's brokerage accounts showed more than $22 million in gross proceeds. (TR. 65). Gladstone's accountant estimated that Gladstone's 1998 tax return would show in excess of $42 million in gross proceeds and that his 1999 tax return would show in excess of $44 million in gross proceeds. (TR. 65-66).

Introduction to Lyle Pfeffer and Michael Blutrich.

In the summer of 1996, a stockbroker introduced Gladstone to John Nielsen, the president of UC'NWin Systems Corporation ("U Can Win"). (TR. 161-62, 594-95). Thereafter, U Can Win used Sterling Travel for its travel needs, and Gladstone bought stock in U Can Win. (TR. 162-63). Gladstone also loaned U Can Win $200,000 for which he received a promissory note. Shares of U Can Win owned by Lyle Pfeffer were held in escrow as security for the loan. (TR. 163-64, 594-96; Pet. ex. 102). U Can Win did not timely repay the loan. (TR. 166; Pet. ex. 107). The pledged shares were sold, and Gladstone recouped most of his money. (TR. 166; Pet. exs. 108, 109).

Gladstone met Pfeffer in September or October 1996 at the offices of Halo Investments, Three Park Avenue, 38th Floor, New York, New York. (TR. 166-67, 174). Halo Investments was a financial public relations firm that worked with U Can

Win. Pfeffer was a principal of Halo Investments. (TR. 167, 373). Gladstone also learned that Pfeffer either owned or managed a nightclub known as Scores.[8] (TR. 168). Gladstone discussed with Pfeffer whether Halo Investments could assist him in making contacts that would be necessary before he tried to make an initial public offering of shares of Sterling Travel. (TR. 169-70).

Thereafter, Pfeffer approached Gladstone about making a loan to New Contenders, Inc. ("New Contenders") to help the company promote a boxing match between Sugar Ray Leonard and Hector "Macho" Camacho. (TR. 170-71). Pfeffer subsequently introduced Gladstone to Blutrich, who he described as the chairman of the board of New Contenders. (TR. 173, 848-50). Blutrich was a lawyer. (TR. 174, 843-45). Blutrich's office was also at Three Park Avenue, 38th Floor, New York, New York. (TR. 174). Gladstone described the offices on the 38th floor of Three Park Avenue as "fancy," "high rent," and "bustling with activity." (TR. 167-68).

After asking a number of questions about the proposal, Gladstone signed an agreement in principle to loan money to New Contenders. (TR. 172-73, 176, 851-53). Gladstone agreed to loan New Contenders $500,000, of which he funded $450,000 from money held by him and his wife in their investment accounts. (TR. 59-61, 176, 853; Pet. ex. 17). He received personal guarantees from Blutrich and Scores. (TR. 244-45, 918, 923; Gov't exs. 26, 27, 28). New Contenders was required to make the first installment payment on the loan on March 15, 1997 and the second

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[8] Blutrich owned Scores Entertainment, Inc., which operated the nightclub. (TR. 850). Pfeffer became an owner of Scores in 1992. (TR. 659).

installment payment on April 15, 1997. (TR. 154).[9] Gladstone asked his attorney, Maureen Abato, to review the documents after they were signed. (TR. 136).

The Leonard/Camacho fight was widely promoted. Gladstone made sure that Sterling Travel was designated as the contact for tickets and travel arrangements to attend the fight. (TR. 179-81).

Introduction to Sholam Weiss.

Late in 1996, Gladstone heard and read that New Contenders might not be permitted to promote the boxing match because of the alleged ties of Blutrich, Pfeffer and Scores to organized crime. (TR. 176-77, 385-86, 596-97; Gov't exs. 31, 49 at 55-56). Gladstone called Pfeffer to discuss the problems. Pfeffer said that "they were wrongfully being connected to organized crime." (TR. 388). Gladstone was assured that, despite these problems, New Contenders would continue to promote the fight. (TR. 177-78, 388-89, 597-98, 738-35, 741). Gladstone stopped payment on a check for $50,000 that was the last installment on the money he agreed to loan to New Contenders. (TR. 176, 178). Gladstone contacted Abato and expressed his concerns that Blutrich did not have the financial wherewithal to repay the loan. Abato responded that Gladstone's "chances of recovery seem dubious, given the current legal problems of Scores, New Contenders and Blutrich." (TR. 432-33; Gov't ex. 77).

Meanwhile, Gladstone began making contacts with people to see if he could become involved in promoting the fight, in the event New Contenders was not able to do so. (TR. 178-79, 181-82). He hired Pat English, an attorney with expertise in the field of boxing, to assist him. (TR. 181). Gladstone

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[9] Gladstone's loan to New Contenders was not part of any scheme to defraud NHLIC, and the transaction was not controlled by Sholam Weiss. (TR. 729-30, 733, 821).

learned that Caesar's Palace had stepped in to promote the fight in place of New Contenders, but that it was looking for someone to post a $7 million line of credit to secure the purse. (TR. 182). Gladstone had difficulty finding a company that would issue the letter of credit, even though he was willing to pledge stocks as security. (TR. 182). On February 14, 1997, Allen Kline called Gladstone and asked him to come to New York to speak with someone named Sholam who might help him salvage the boxing match. (TR. 96-99). Gladstone knew Kline as the director or stockholder of a company called Sector Communications, Inc. ("Sector"), in which Gladstone had invested. (TR. 183-84). Gladstone had previously loaned Kline $50,000, which Kline repaid with an assignment of stock. (TR. 185-86).

Gladstone left for New York on February 14, 1997. (TR. 99). In New York, Kline introduced Gladstone to Weiss. (TR. 187).[10] Gladstone did not know at the time of this meeting that Weiss shared office space with Pfeffer and Blutrich. (TR. 401). Weiss did not help Gladstone obtain the $7 million line of credit for the boxing match. However, in their discussions Gladstone learned that Weiss owned or controlled shares of Sector stock. Between September 1996 and February 1997, Gladstone had sold approximately 500,000 shares of Sector stock short, and he was looking for a way to cover the short sale at less than the market price. (TR. 188, 397). In February and March 1997, Gladstone bought 1.6 million shares of Sector stock from Weiss for approximately $650,000. (TR. 188-89, 402-09; Gov't ex. 103).

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[10] Blutrich recalled that he introduced Weiss to Gladstone in 1996, when Gladstone was visiting Scores. (Doc. No. 1899 at 46).

At Weiss's instruction, Gladstone wired $200,000, the amount owed to pay for a portion of the stock, to an account in Gladstone's name at a hotel and casino in Atlantic City, New Jersey. (TR. 189, 405-06). Gladstone met Weiss in Atlantic City on March 1, 1997, the night of the Leonard/Camacho fight,[11] and he gave Weiss the $200,000. (TR. 100, 190). Gladstone recalled that Weiss gambled heavily during their time together in Atlantic City, betting about $10,000 per hand at the blackjack tables. (TR. 191, *see also* TR. 795).

Thereafter, Gladstone continued to engage in stock transactions with Weiss and individuals Weiss represented. (TR. 409-13; Doc. No. 1899 at 118; see, *e.g.*, Gov't ex. 65). For instance, Gladstone began investing in stock of Creative Learning Products, often referred to as CLPI; Pfeffer recommended the stock, and Weiss later told Gladstone that he owned shares of the stock. (TR. 409-11). Gladstone frequently talked by telephone with Weiss, including during Weiss's criminal trial. (TR. 498-99, 527-38). Schneiderman overheard conversations in which Weiss and Gladstone indicated that they were holding various shares of stock for each other. (Doc. No. 1899 at 119, 121-22, 125). After Gladstone testified at the criminal trial in this case, he flew back to New York on a plane chartered by Weiss. During this flight, Schneiderman heard Gladstone and Weiss arguing about which one of them owed the other money related to their stock transactions. (Doc. No. 1899 at 123-25).

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[11] The evidence did not show how Caesar's Palace resolved the line of credit issue, but the boxing match nevertheless occurred. The record contains the program from the Leonard/Camacho fight, which program contains a full page ad for Sterling Travel. (Pet. ex. 71). Sterling Travel also had a banner posted at the boxing arena. (TR. 190-91).

Repayment of the New Contenders Loan.

After the boxing match took place, Gladstone began discussions with Pfeffer about how New Contenders was going to repay the money it owned to him. (TR. 193). He did not speak to Blutrich directly about the repayment of the loan. (TR. 194). Pfeffer assured Gladstone that Blutrich was working on a way to repay the money and that he had the wherewithal to repay the money. (TR. 194-95). Gladstone also discussed with Abato the steps that could be taken to recover the money he had loaned to New Contenders. (TR. 138).

Gladstone received a number of proposals about repayment of the loan. At some point, Weiss became involved in these discussions (TR. 761-63, 799). Pfeffer mentioned that there was a first mortgage on a piece of property that he and Blutrich wanted to sell to raise money. Pfeffer suggested that Gladstone could buy the mortgage at a discount, in exchange for the forgiveness of the loan to New Contenders. (TR. 196-97). Gladstone learned that the mortgage was on a piece of real property in New Jersey on which a shopping center, called the Center Mall, was built. (TR. 197). The mall was 50,000 square feet, and it cost $7 million to build in 1990. (TR. 198; Gov't ex. 40). Pfeffer said that the mortgage was non-performing and tax payments were delinquent. (TR. 198-99). Pfeffer testified that he told Gladstone that there were title problems due to a *lis pendens* on the property (TR. 833)[12], but Gladstone denied knowledge of the *lis pendens*. (TR. 240-41). The face amount of the mortgage was $4.3 million. Pfeffer told Gladstone that he could buy the mortgage for $1.5 million, but Gladstone agreed to pay only $1 million of which $450,000 would be credited to the New Contenders' debt and the additional $550,000 would be paid

[12] Blutrich also testified that Gladstone was present when Blutrich and Weiss discussed the existence of the *lis pendens*. (TR. 907-08).

in cash. (TR. 199, 902-04). Pfeffer and Blutrich also stated that they might be willing to repurchase the mortgage for $2 million at a later date. (TR. 474; Gov't ex. 49 at 114-15).

Gladstone did not inquire who owned the mortgage. (TR. 454). He did not investigate who owned the underlying property. (TR. 453-56). He did not obtain an appraisal. (TR. 473). He did ask for rent rolls for the property. (TR. 198, 483). Gladstone also spoke with his friend Jim Krantz and Jim's brother, John Krantz. Jim Krantz managed and insured property in New Jersey. John Krantz managed commercial property in New Jersey, including shopping centers (TR. 200, 450). Jim and John Krantz reviewed the rent roll and looked at the property. (TR. 201, 452; Pet. ex. 49). They told Gladstone that the property was a $3 million asset, but if managed properly it could be worth over $5 million. (TR. 201). Gladstone also spoke with Abato, who was not a expert in real estate transactions. Abato spoke with a friend who suggested that Gladstone obtain title insurance to protect his investment. Abato relayed this advice to Gladstone. (TR. 146, 153, 200). Gladstone also discussed the proposed transaction with his brother, who is an attorney. (TR. 200).

Gladstone agreed to buy the mortgage, but he asked for a title insurance policy. (TR. 202, 907-08). Weiss instructed Blutrich to call a specific title company to get title insurance for the transaction so that, if the assignment was contested, the title company would be at fault rather than the participants in the transaction. (TR. 907-08). Gladstone could not recall how the title company was selected. (TR. 446-47). After Gladstone learned the name of the proposed title company, English told him that the company was reputable. (TR. 203-04).

Formation of Stonewell Corporation.

In March 1997, Gladstone asked Abato to form a corporation to accept assignment of the Center Mall mortgage. (TR. 129, 132, 145, 148-49, 156). Pursuant to Abato's advice, Richard Gladstone paid Loughlin Associates to incorporate Stonewell Corporation in Nevada. (TR. 58-59, 130, 132; Pet. ex. 15). Articles of incorporation for Stonewell Corporation were signed on March 12, 1997 and filed on April 1, 1997. (TR. 87; Pet. ex. 13). Thereafter, Gladstone used Stonewell to trade in stocks as well as to acquire the Center Mall mortgage. (TR. 71-73, 103, 224-26; Pet. ex. 26). Gladstone is and always has been the sole officer and shareholder of Stonewell. He is also a director of Stonewell. (TR. 251-57).

Assignment of the Center Mall Mortgage to Stonewell.

On March 20, 1997, Gladstone went to a conference room at Three Park Avenue, 38th Floor, where he signed documents to assign the Center Mall mortgage to Stonewell. (TR. 209-10, 238). Gladstone assigned the $450,000 note due to him from New Contenders to Jasper. (TR. 210-22; Pet. ex. 19). Pfeffer, acting on behalf of Jasper[13], assigned the Center Mall mortgage to Stonewell. (TR. 88, 209-22, 645-46, 899; Pet. exs. 18, 19; Gov't exs. 121, 122).[14] Blutrich acted as the attorney for Jasper. (TR. 215, 485). Gladstone left checks for $550,000 at the closing, with the understanding that

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[13] Records of the Department of Treasury, State of New Jersey, reflect that Jasper's registration was administratively revoked on March 5, 1996 and had not been reinstated as of January 22, 1999. (Gov't ex. 16).

[14] Gladstone did not sign a release of the guarantee provided by Scores (TR. 440), but he testified in a deposition in *Williams v. LPDA* that part of the deal was that he would not pursue the personal guarantee Scores had made (Gov't ex. 49 at 134). In December 1998, Gladstone filed a claim in the Scores bankruptcy proceeding seeking to collect funds from Scores pursuant to its agreement to guarantee repayment of the loan to New Contenders, which claim was settled. (TR. 440-41, 564-65; Gov't ex. 132).

they would not be cashed until the title insurance policy was issued. (TR. 430-31, 485-86). Gladstone, on behalf of Stonewell, also paid for issuance of the title insurance policy. (TR. 219-20). Gladstone left all of the signed documents at the closing, relying on Blutrich to transmit them to the title insurance company. (TR. 484-85).[15]

Gladstone subsequently learned that the title insurance company needed verification that Pfeffer had the authority to act for Jasper. (TR. 212). He later received letters from Pfeffer and Blutrich attesting to Pfeffer's authority to act on behalf of Jasper. (Gov't ex. 121). On March 24, 1997, Gladstone received a letter from the title insurance company acknowledging the assignment of the mortgage to Stonewell Corporation and issuance of the title insurance. (TR. 217-19; Pet. ex. 23). The title insurance policy reflects that the title to the underlying real estate was vested in Future Diversified. The schedule of exceptions (Schedule B) of the title insurance policy did not reflect any problem with the validity of the first mortgage assigned to Stonewell, and it did not include a reference to the *lis pendens* on the underlying property. (TR. 910; Pet. ex. 24). The records of Monmouth County, New Jersey reflect that Jasper assigned the Center Mall mortgage to Stonewell. This Assignment of Mortgage was recorded on March 24, 1997. (Pet. ex. 18).

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[15] Late in 1996, Blutrich and Pfeffer began cooperating with law enforcement agencies in an organized crime investigation in the Southern District of New York. They generally advised representatives of the United States Attorney's Office for the Southern District of New York and the FBI of the proposed transactions involving the Center Mall mortgage and property before they occurred. (TR. 714, 718, 830-32, 894-95).

On March 27, 1997, Gladstone wired $325,000 from his brokerage account to Blutrich as attorney for Jasper; this money was loaned by Gladstone to Stonewell to be used to buy the Center Mall mortgage. (TR. 69, 214-15; Pet. ex. 22). An additional $150,000 was disbursed from another brokerage account belonging to the Gladstones. (TR. 70, 215; Pet. ex. 22). The final $75,000 was disbursed from a partnership owned by Gladstone and his wife. (TR. 216, Pet. ex. 22).

Gladstone testified that he did not act, through Stonewell, as a nominee for Sholam Weiss in the purchase of the Center Mall mortgage. (TR. 226-27, 237). He averred that Weiss did not provide, or repay, the personal funds Gladstone loaned to New Contenders or the personal funds he loaned to Stonewell to purchase the Center Mall mortgage. (TR. 235-37). Pfeffer testified that Gladstone told him he was acting as Weiss's nominee in causing Stonewell to acquire the Center Mall mortgage,[16] but Gladstone denied making this statement. (TR. 237, 593). Pfeffer was unable to give specific information about when this conversation purportedly occurred or the substance of the conversation. (TR. 592-93, 646-47, 743).

Pfeffer also testified that, before the transaction closed, Gladstone told him that Weiss had agreed to return the money Gladstone, through Stonewell, was paying to purchase the Center Mall mortgage. Gladstone asked Pfeffer for reassurance that Weiss would repay this money. (TR. 641). Pfeffer testified that Weiss told him that he was covering the $550,000 that Gladstone was paying, and that Weiss would take care of the $450,000 debt incurred by New Contenders. (TR. 647-48).

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[16] Blutrich testified that Weiss later told him that Gladstone was acting as Weiss's nominee. (TR. 913).

After the mortgage was assigned to Stonewell, Gladstone interviewed law firms about taking steps to execute on the foreclosure judgment. (TR. 474-75). He did not send any demand letters to the owner of the Center Mall property. (TR. 475).

On November 13, 1997, Gladstone learned that an issue had arisen in *Williams v. LPDA*, which involved, in part, whether the mortgage on the Center Mall property was a valid encumbrance. (TR. 263, 267, 475, 889). Gladstone testified that this was the first time he was aware of the *Williams v. LPDA* action. (TR. 240, 242). Gladstone discussed this issue with Pfeffer. Pfeffer told him that it had been contemplated that the mortgage would be discharged, but that the mortgage had not been discharged and no discharge had been recorded. Pfeffer assured Gladstone that the Center Mall mortgage was valid. (TR. 267).[17]

Assistance with Attorneys' Fees.

**Jan Schneiderman**

In approximately April 1998, Schneiderman asked Weiss for assistance in raising money to pay her attorneys. Weiss told her that he had arranged for her to sell a fictitious option to purchase her Manhattan apartment to Gladstone. The option purchase price was $25,000, which was the amount Schneiderman needed to pay as a retainer to her attorneys. (Doc. No. 1899 at 134-36, 141-42). Gladstone testified that Weiss may have spoken to him about Schneiderman's apartment, but Gladstone could not recall the substance of their conversation. (TR. 522).

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[17] The presiding judge in *Williams v. LPDA* is awaiting the outcome of these forfeiture proceedings before resolving the issues in that case. (TR. 958-59).

Gladstone stated in sworn answers to interrogatories and in his initial testimony at the evidentiary hearing in this case that Schneiderman offered to sell him an option to purchase her apartment in New York, but the transaction was not consummated. (TR. 518-24, 568; Gov't ex. 89, interrogatory 14). Gladstone testified that Weiss did not ask him to engage in this transaction, and he did not know why Schneiderman was trying to raise money. (TR. 520-22). Gladstone did not visit the apartment. (TR. 522-23; Doc. No. 1899 at 142). Gladstone initially did not recall ever issuing a check to Schneiderman. (TR. 568).

Schneiderman agreed to cooperate with the United States in August 2001, shortly before the evidentiary hearing in this matter began. (Doc. No. 1899 at 132, 147). She produced copies of the option agreement signed by Gladstone on April 16, 1998 and copies of financial records showing that Gladstone wire transferred $25,000 into her bank account, which money she paid to her attorneys. (Doc. No. 1899 at 134-40). Before the hearing resumed on November 13, 2001, Gladstone also produced to the United States a copy of the signed agreement to purchase an option on Schneiderman's apartment and records showing that he transferred $25,000 to her on April 16, 1998. (Pet. ex. 122).

**Sholam Weiss**

Joel Hirschhorn represented Sholam Weiss during the criminal trial. As part of his fee agreement with Weiss, Hirschhorn held two stock certificates in United Ventures Group, Inc. issued to Richard Gladstone as collateral for full payment of the agreed fee. (TR. 334). An attorney, Steve Altman, gave Hirschhorn these stock certificates in January 1999, which certificates had been signed on the back by Gladstone and dated December 29, 1998. No information was inserted indicating to whom the certificates would be transferred. (TR. 341, 354; Gov't exs. 86, 87). Hirschhorn's office also received a blank Irrevocable Stock or Bond Power

signed by Gladstone, but how this document was transmitted to Hirschhorn is not reflected in the record. (TR. 356-57; Gov't ex. 88).

Hirschhorn did not have any dealings with Gladstone concerning the transfer of this stock. (TR. 347). Gladstone testified that he did not know about the transfer of stock to Hirschhorn, and he could not explain the transfer other than to say that Altman's law firm had handled transactions in these securities for Gladstone. (TR. 503-05, 558-62). In his normal course of business, Gladstone kept blank, medallion guaranteed, stock powers to be used when necessary to transfer ownership of stock. (TR. 507-11, 545-48; Pet. ex. 47).

## II. STANDARD OF REVIEW.

The United States Court of Appeals for the Eleventh Circuit reviews a district court's factual determinations in a forfeiture proceeding under the clearly erroneous standard. *Braxton v. United States*, 858 F.2d 650, 654 (11th Cir. 1988).

## III. ANALYSIS.

### *A. The United States Did Not Establish that Gladstone and Stonewell Acted Solely as the Alter Ego of Sholam Weiss.*

Only an individual other than the convicted defendant can file an ancillary claim under 18 U.S.C. § 1963(*l*). Here, the United States contends that Gladstone, through Stonewell, acted solely as the nominee for Weiss, a convicted defendant. As such, the United States argues that Gladstone and Stonewell cannot bring a third-party claim because they are, in reality, acting on behalf of a convicted defendant.

In the extensive forfeiture litigation involving the Bank of Credit and Commerce International and related companies ("BCCI"), the presiding district judge established a procedure for resolving the question whether a third-party claimant is merely a nominee of the convicted defendant. She required that the United States establish that the person or entity holding the property sought to be forfeited was the alter ego of the defendant. Once the alter ego finding was made, the court permitted the claimant, through the ancillary forfeiture hearing, to present evidence that it was not the alter ego of the defendant. *United States v. BCCI Holdings (Luxemborg), S.A.*, 69 F. Supp. 2d 36, 53 (D.D.C. 1999). I find this procedure to be consistent with the provisions of section 1963(*l*), and I will use it as guidance in resolving the question of whether Gladstone, on behalf of Stonewell, acted solely as Weiss's alter ego.

I find that the United States failed to establish by a preponderance of the evidence that Gladstone and Stonewell acted solely as Weiss's alter ego. The evidence established that Gladstone used Stonewell to make investments, which included trading in stocks as well as the purchase of the Center Mall mortgage. The United States offered no evidence that the stock purchases by Stonewell were done on behalf of Weiss. Indeed, in closing arguments counsel for the United States conceded that all the United States was seeking to forfeit was Stonewell's claim to the Center Mall mortgage and the proceeds from the sale of the Center Mall property. (Doc. No. 1892 at 13-14). Thus, the preponderance of the evidence shows that Stonewell was an entity that acted independently of Weiss. As such, I find that Gladstone, through Stonewell, did not act *solely* as Weiss's alter ego.

The amended preliminary order of forfeiture entered by the Court, at the request of the United States, states that the United States is entitled to possession of Stonewell Corporation. The United States now concedes that it does

not claim that Weiss had an interest in all of Stonewell; it limits its forfeiture argument to one of Stonewell's assets. Therefore, I find that Gladstone, on behalf of Stonewell, has standing to contest the amended preliminary order of forfeiture because that order encompasses property that the United States no longer claims is forfeitable, that is the stock and assets of Stonewell Corporation other than its interest in the Center Mall mortgage.

*B. Weiss's Interest in the Center Mall Mortgage.*[18]

Under 18 U.S.C. § 1963(*l*)(6)(A), Gladstone, on behalf of Stonewell, has the burden of proving by a preponderance of the evidence that Stonewell had a right, title or interest in the Center Mall mortgage that vested before the commission of the acts that gave rise to the forfeiture. Alternatively, under 18 U.S.C. § 1963(*l*)(6)(B), Gladstone, on behalf of Stonewell, must establish by a preponderance of the evidence that Stonewell was a bona fide purchaser for value of the Center Mall mortgage and that it was reasonably without cause to believe that the property was subject to forfeiture at the time of the purchase. *See United States v. Martinez*, 228 F.3d 587, 590 (5th Cir. 2000). Gladstone, on behalf of Stonewell, proceeds under both of these provisions.

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[18] The United States argues that there was nothing for Stonewell to purchase, because the Center Mall mortgage was discharged as part of the Capital Properties transaction. It is undisputed, however, that the discharge was never recorded in the public records of Monmouth County, New Jersey. I do not reach the question of whether the mortgage existed at the time of its purported transfer to Stonewell because I conclude that, assuming the Center Mall mortgage existed when it was acquired by Stonewell, Gladstone, on behalf of Stonewell, has not met his burden of proof under 18 U.S.C. § 1963(*l*).

### 1. Stonewell's Claim to the Center Mall Mortgage Vested After the Commission of the Acts that Gave Rise to the Forfeiture.

The Center Mall mortgage was subject to forfeiture at the time it was assigned to Jasper through use of the proceeds of racketeering activity, in this case $3.1 million fraudulently acquired from NHLIC. *See, e.g., Martinez*, 228 F.3d at 590. This assignment, which occurred in 1989, preceded the assignment of the Center Mall mortgage to Stonewell. As such, Gladstone has not proven that Stonewell's interest in the Center Mall mortgage vested before commission of the acts that made the mortgage subject to forfeiture.

### 2. Gladstone, on Behalf of Stonewell, Has Not Established by a Preponderance of the Evidence that He Was a Bona Fide Purchaser for Value Who Was Reasonably Without Cause to Believe the Center Mall Mortgage Was Subject to Forfeiture.

Richard Gladstone is a wealthy businessman. Before he ever met Sholam Weiss, Gladstone loaned money to New Contenders, a boxing promotion company with which Blutrich was affiliated. There is no evidence, and the United States does not argue, that Gladstone acted on behalf of Weiss in this transaction.

When Gladstone learned that New Contenders would not be able to promote the fight because of alleged ties of the company and its principals to organized crime, he began looking for a way to protect his investment. Through these efforts, the owner of Sector Communications introduced Gladstone to Sholam Weiss. Weiss did not assist in raising money to promote the boxing match. He did, however, agree to sell, or arrange for the sale, of stock in Sector to Gladstone, who then held short positions in the stock that he needed to cover. Thereafter, Gladstone and Weiss engaged in

a number of stock transactions. Gladstone purchased blocks of stock — which he defined as at least 10,000 shares — at a discount for such large purchases. While the United States argues that Weiss gave Gladstone discounts in excess of those commonly offered to purchasers of blocks of stock, there is no evidence of supporting that argument.

Meanwhile, Gladstone was engaged in discussions with Lyle Pfeffer about repayment of the loan Gladstone had made to New Contenders. At some point, Weiss became directly involved in these discussions. Weiss and Pfeffer ultimately proposed that Gladstone would purchase the Center Mall mortgage for $1 million, to be paid through transfer of the $450,000 indebtedness to the seller of the mortgage, Jasper Properties Corporation, and an additional payment of $550,000 by Gladstone. There is no evidence that Gladstone knew that the assignment of this mortgage was part of a scheme to defraud NHLIC.

Gladstone took steps he believed were reasonable to investigate the proposed transaction — he spoke with his attorneys, he conferred with friends knowledgeable about the real estate market in question, and he obtained a title insurance policy that reflected no defects in the mortgage being purchased. Others in a similar situation might have taken additional steps, but Gladstone's failure to do so is consistent with the manner in which he made his investment in New Contenders — that is, he made his own inquires and asked lawyers simply to review the transaction he negotiated.

Gladstone denied that Weiss made promises to repay the money paid for the Center Mall mortgage. Pfeffer testified, however, that Gladstone told him that Weiss had agreed to repay the money and to obtain a resolution of the $450,000 debt from the loan to New Contenders. Pfeffer's testimony is questionable, however. He was unable to provide details

of the dates, places or participants in these conversations. Therefore, I must look to other evidence to determine whether to believe Gladstone or Pfeffer on this issue.

Gladstone's actions following the assignment of the Center Mall mortgage to Stonewell support Pfeffer's testimony that Weiss assured Gladstone that the money he used to purchase the Center Mall mortgage was not at risk. In the eight months between the assignment of the mortgage and Gladstone receiving notice that the validity of the mortgage was being questioned in *Williams v. LPDA*, Gladstone did not aggressively seek to convert the mortgage to a tangible asset. He had a forfeiture judgment, which could have been used to compel a sale of the underlying property. He could have asked Pfeffer, who was the owner of record of the company that owned the Center Mall property, for permission to have John Krantz manage the Center Mall to see if it could become profitable under new management. There is no evidence that he did so. A reasonable investor would have made such efforts, having $1 million at stake. The failure to do so raises a reasonable inference that Gladstone did not believe that his money was truly at risk.

This inference is bolstered by Gladstone's actions after the validity of the mortgage was questioned. He did not seek to rescind the purchase of the Center Mall mortgage based on Pfeffer and Blutrich's failure to disclose the existence of the *Williams v. LPDA* suit to him before Stonewell purchased the Center Mall mortgage. He did not demand that Blutrich and Pfeffer purchase the mortgage based on their earlier representations that they would like an option to purchase the mortgage for $2 million. Instead, he continued to engage in extensive business dealings with Weiss and his associates.

Perhaps most tellingly, in 1999 Gladstone paid Jan Schneiderman $25,000 for an option to purchase an apartment he had never seen. He made no efforts to exercise the option. He offered no plausible reason for the transaction. Indeed, initially he failed to disclose this transaction, despite discovery requests seeking information about it. Gladstone only acknowledged the transaction after he learned that Schneiderman told the United States about the transaction and produced documents to substantiate her testimony. This evidence shows that Gladstone continued to be a willing participant in Weiss's schemes, whether or not he knew the breadth of Weiss's criminal activities.

Gladstone has the burden of proving that he, through Stonewell, was a bona fide purchaser for value of the Center Mall mortgage. Although it is undisputed that the $450,000 loaned to New Contenders and the $550,000 paid for the Center Mall mortgage came from Gladstone's personal funds, the preponderance of the evidence establishes that Gladstone did not believe this money was at risk based on Weiss's promise that the money would be repaid. As such, I find that Gladstone, through Stonewell, was not a bona fide purchaser for value of the Center Mall mortgage because he served only as Weiss's nominee in the purchase of the Center Mall mortgage.

## IV. RECOMMENDATION.

For the reasons set forth above, I recommend that the Court find that Richard Gladstone has sustained his burden of proof under 18 U.S.C. § 1963(*l*) with respect to his ownership of the stock of Stonewell Corporation and Stonewell Corporation's ownership of all of its assets except for its interest in the Center Mall mortgage. I further recommend that the Court find that Richard Gladstone, on behalf of Stonewell Corporation, has not sustained his burden of proof under 18 U.S.C. § 1963(*l*) with respect to Stonewell

Corporation's interest in the Center Mall mortgage and the proceeds from the sale of the Center Mall property. Accordingly, I recommend that the Amended Preliminary Order of Forfeiture be amended to reflect that the United States is entitled to possession only of the interest of Stonewell Corporation in the Center Mall mortgage, which interest Stonewell held solely as a nominee for Sholam Weiss.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

Respectfully recommended in Orlando, Florida on this 20th day of February, 2002.

/s/ Karla R. Spaulding
KARLA R. SPAULDING
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Presiding District Judge and Courtroom Deputy
Counsel of Record
Unrepresented Parties

**Appendix J**

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**ORLANDO DIVISION**

FILED
[???] AM 9:14
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

CASE NO. 6:99-CR-98-ORL-19A

UNITED STATES

Plaintiffs,

v.

SHOLAM WEISS, et al.,

Defendants.

_____/

IN RE CLAIM OF RICHARD GLADSTONE

**ORDER**

This case is before the Court on the following matters:

1) Petitioner Richard Gladstone's Motion for Summary Judgment (Doc. No. 1761), Memorandum in Support of Motion for Summary Judgment (Doc. No. 1762), Statement of Material Facts (Doc. No. 1763) and Supplemental Memorandum of Law in Support of Summary Judgment (Doc. No. 1794); United States' Partial Response (Doc. No. 1774), Memorandum in Opposition to Petitioner's Motion for Summary Judgment (Doc. No. 1775), Counterstatement of Facts

(Doc. No. 1776) and Supplemental Memorandum of Law in Opposition to Richard Gladstone's Motion for Summary Judgment (Doc. No. 1795).

2) United States' Motion that Trial on Third-Party Petition of Richard Gladstone be Tried by the District Judge (Doc. No. 1800); United States' Supplemental Memorandum in Support of Motion that Trial on Third-Party Petition of Richard Gladstone be Tried by the District Judge (Doc. No. 1830); Petitioner Richard Gladstone's Memorandum in Opposition to United States' Motion that Trial on Third-Party Petition be Tried by the District Judge (Doc. No. 1824).

The United States' Memorandum in Opposition to Petitioner's Motion for Summary Judgment was supported by the declarations of James J. Black III (Doc. No. 1777), Edward B. Gaines (Doc. No. 1778) and Thomas K. Lindgren (Doc. No. 1779). The Court referred Petitioner Richard Gladstone's ("Gladstone") Motion for Summary Judgment to United States Magistrate Judge Karla R. Spaulding for review. Magistrate Judge Spaulding issued two Report and Recommendations on Gladstone's Motion for Summary Judgment. (Doc. Nos. 1785 & 1819). The United States filed objections to both Report and Recommendations, and Gladstone filed an objection to only the second Report and Recommendation issued on July 26, 2001. See (Doc. Nos. 1792, 1828 & 1831).

**PROCEDURAL HISTORY:**

On November 1, 1999, the jury in this criminal case returned guilty verdicts against Sholam Weiss ('Weiss") and others. The jury also entered special verdicts of forfeiture finding that Weiss' and defendant Keith Pound's interests in Stonewell Corporation ("Stonewell") were forfeitable pursuant to 18 U.S.C. § 1963. The Court entered an

Amended Preliminary Order of Forfeiture on May 12, 2000.[1] (Doc. No. 1445 & 1446). Gladstone, by petition filed April 5, 2000 pursuant to 18 U.S.C. § 1963(l), seeks to amend the amended Preliminary Order of Forfeiture to delete Stonewell from the list of forfeitable property. Gladstone now moves for summary judgment on his claim.

**LEGAL STANDARD:**

Summary judgment is authorized "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); accord Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Summary judgment is appropriate only in circumstances where "the evidence is such that a reasonable jury could [not] return a verdict for the non-moving party." Id. The moving party bears the burden of proving that no genuine issue of material fact exists. Celotex v. Catrett, 477 U.S. 317, 323 (1986).

In determining whether the moving party has satisfied the burden, the court considers all inferences drawn from the underlying facts in the light most favorable to the party opposing the motion and resolves all reasonable doubt against the moving party. Anderson, 477 U.S. at 255. The court may not weigh conflicting evidence or weigh the credibility of the parties. See Hairston v. Gainesville Sun Pub. Co., 9 F.3d 913, 919 (11th Cir. 1993) (citation omitted) If a reasonable fact finder could draw more than one inference from the facts, and that inference creates an issue of material fact, then a court must not grant summary judgment. Id. (citation omitted).

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[1] The Amended Preliminary Orders of Forfeiture state that the United States is "entitled to possession of: . . . Stonewell Corporation." (Doc. Nos. 1445 & 1446).

The Magistrate Judge has issued Report and Recommendations on Gladstone's Motion for Summary Judgment. The Court shall make a de novo determination of those portions of the Magistrate Judge's report or specified proposed findings or recommendations to which objection is made. Title 28 U.S.C. § 636(b)(1). The Court is authorized to accept, reject, or modify, in whole or in part, the findings or recommendations made by the Magistrate Judge. Id.

**ANALYSIS:**

**1) United States' Claim that the Court Improperly Referred the Trial on Gladstone's Petition to the Magistrate Judge:**

As an initial matter, the United States contests the referral of the trial on Gladstone's claim to the Magistrate Judge. See (Doc. No. 1800). On August 7, 2000 the Court referred to Magistrate Judge Spaulding all matters related to the claims of the Third Party Petitioners." (Doc. No. 1482). The Court further provided that: "the United States Magistrate Judge shall have the authority to oversee discovery, and she shall have the authority to issue reports and recommendations on any dispositive motions and on any findings that she makes at the conclusion of any hearings or trials that she conducts." Almost one year after the Court's referral to the Magistrate Judge, the United States argues that the referral was improper and that the Magistrate Judge is without authority to conduct hearings and a trial and issue report and recommendations on her findings. See (Doc. No. 1800). The United States maintains that nothing in the statutory provisions of 28 U.S.C. § 636(b)(1)(A) and (B) authorizes a Magistrate Judge to conclude the case by trial. Instead, the United States claims that the Court's referral to the Magistrate Judge was pursuant to 28 U.S.C. § 636(c) which requires the parties' consent for a Magistrate Judge to "conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case . . ." 28 U.S.C. § 636(c)(1).

As the parties have not consented to the Magistrate Judge conducting the trial and issuing final judgment, the United States contends that the Court's referral of these proceedings to the Magistrate was improper.

The United States' contention that the Court's referral to the Magistrate Judge was made pursuant to 28 U.S.C. § 636(c)(1) is incorrect. The Court did not grant the Magistrate Judge authority to conduct a trial and order the entry of judgment in the case, an action which would require the parties' consent under § 636(c)(1). Instead, the Court referred the matter to the Magistrate Judge for her to make reports and recommendations on any findings she makes during a hearing or trial. The Magistrate Judge, in this case, does not have authority to enter final judgment and may only make recommendations to the Court after conducting a hearing or trial.

The United States' focus on the distinctions between a hearing and a trial are not relevant to the inquiry of whether the Court's referral was proper. Since the Court did not authorize the Magistrate Judge to enter final judgment in the case, the Court's use of the word "trial" in the referral Order does not make the referral one which requires the parties' consent under § 636(c)(1). The Court's referral of all matters related to the claims of Third Party Petitioners was, pursuant to 28 U.S.C. § 636(b)(1), and the Magistrate Judge has the authority to conduct proceedings related to these claims and to issue reports and recommendations on her findings. See 28 U.S.C. § 636(b)(1); Local Rule 6.01(c); see also United States v. Kennedy, 201 F.3d 1324, 1327 (11th Cir. 2000); United States v Libretti, 1998 WL 644265 at *2 (10th Cir. 1998).

**2) Gladstone's Motion for Summary Judgment:**

Magistrate Judge Spaulding submitted two Report and Recommendations on Gladstone's Motion for Summary Judgment. The Court will address the recommendations and objections to each Report and Recommendation individually.

**a) Magistrate Judge Spaulding's June 27, 2001 Report & Recommendation:**

Magistrate Judge Spaulding recommended that Gladstone's Motion for Summary Judgment be granted as it pertains to Defendant Keith Pound's interest in Stonewell. See (Doc. No. 1785). As the United States concedes that summary judgment should be granted as to Pound's interest, the Court affirms and adopts the Magistrate Judge's report and recommendation on this issue. The Court finds that Defendant Keith Pound did not have any interest in Stonewell, and accordingly, Gladstone's Motion for Summary Judgment as it pertains to Pound's interest is granted.

Magistrate Judge Spaulding further recommended that the Court amend the Amended Preliminary Orders of Forfeiture to reflect that the United States is entitled to possession only of Weiss' and Pound's interests in the forfeited properties. See id. The jury's forfeiture verdicts stated that Weiss' and Pound's interests in Stonewell were forfeitable, however the Amended Preliminary Orders of Forfeiture stated that the United States was entitled to possession of the entire corporation. See (Doc. Nos. 1445 & 1446). The Magistrate Judge, citing United States v. Gilbert, 244 F.3d 858, 915-916 (11th Cir. 2001), recommended that the Amended Preliminary Order of Forfeiture be amended to more accurately reflect the extent of the jury's forfeiture verdict. See (Doc. No. 1785, at 4).

United States objects to this recommendation and claims that the Amended Preliminary Order of Forfeiture is correct in its current form. The United States argues that Gilbert opinion is irrelevant to the instant case as the Gilbert Court found that a jury's verdict form for forfeiture was invalid because it did not ask the jury to identify the defendant's interest in the property subject to forfeiture. See (Doc. No. 1792, at 6). Moreover, the United States maintains that the Gilbert Court erroneously relied on the repealed Federal Rule of Criminal Procedure 31(e) when the Court found that a jury must determine the extent of the defendant's interest in property prior to the entry of a forfeiture order. See id. Instead, the United States maintains that Federal Rule of Criminal Procedure 32.2, which replaced Rule 31(e), does not require a jury to determine the extent of a defendant's interest in forfeitable property. The United States objects to the Magistrate Judge's reliance on Gilbert for her recommendation that the Amended Preliminary Orders of Forfeiture should be modified.

Rule 32.2, which became effective on December 1, 2000, governs forfeiture proceedings and also does not require the extent of a defendant's interest in forfeitable property to be determined by the jury. Under the new Rule, if the Court finds that property is forfeitable, it enters a preliminary order of forfeiture of whatever interest each defendant might have in the property without determining the extent of a defendant's interest. See Federal Rule of Criminal procedure 32.2. The Court then conducts an ancillary Proceeding to determine the defendant's and any third-party's interests in the property.

The Court agrees with Magistrate Judge Spaulding's recommendation that the Amended Preliminary Order of Forfeiture should be amended to reflect the forfeiture of only Weiss' and Pound's interests in Stonewell. Despite the Gilbert Court's reliance on Rule 31(e), a court's order of

forfeiture cannot subject to forfeiture more than what is indicated in a jury's special verdict of forfeiture. Accordingly, the Court's Amended Preliminary Orders of Forfeiture (Doc. Nos. 1445 & 1446) should be amended to only order the forfeiture of whatever interest the Defendants Weiss and Pound might have in the properties.

**b) Magistrate Judge Spaulding's July 26, 2001 Report and Recommendation:**

Magistrate Judge Spaulding recommended that the Court deny Gladstone's Motion for Summary Judgment as it pertains to Weiss' interest in Stonewell. See (Doc. No. 1819). Magistrate Judge Spaulding upheld the validity of the Jury's special verdict of forfeiture and found that there existed a material issue of fact as to whether Gladstone was acting as Weiss' nominee in forming Stonewell. Both Gladstone and the United States have objected to the Magistrate Judge's findings.

Gladstone maintains that the jury's special verdict of forfeiture is invalid because the jury failed to identify what portion of Stonewell belonged to Weiss and was therefore subject to forfeiture. See (Doc. No. 1828). Gladstone argues that the United States is now trying to establish that Weiss had a 100% interest in Stonewell when it was clear that the jury did not make such a finding. Gladstone argues that, pursuant to the holding of Gilbert, the Court may not now make a post-trial finding that amends the jury's verdict of forfeiture.

Gladstone is correct in his assertion that the Court may not retroactively amend the Jury's special verdict of forfeiture to state that Weiss had a 100% interest in Stonewell that is subject to forfeiture. See Gilbert, 244 F. 3d 915-16. However, as the Magistrate Judge correctly found, the Court has not and is not attempting to amend the jury's special verdict of forfeiture. By entering the Amended Preliminary Order of

Forfeiture, the Court simply ordered that whatever interest Weiss had in Stonewell was forfeited to the United States. The Magistrate Judge correctly ruled that the problem that existed in Gilbert does not exist here.

Gladstone also argues that the property forfeited in the jury's special verdict of forfeiture was simply the stock in Stonewell not the corporation's assets. The Center Point Mall Mortgage, according to Gladstone, is not subject to forfeiture as it is a corporate asset and not included in the ownership interest of the corporate entity. As it is undisputed that Gladstone is the sole Stonewell stockholder of record, Gladstone claims that Weiss had no forfeitable interest in Stonewell[2].

The interests in Stonewell that the jury found to be forfeited were not limited to the corporation's stock. The jury forfeited Weiss' interest in Stonewell, which could be a forfeiture of Stonewell's assets having a nexus to Weiss' money laundering activities such as the Center Point Mall Mortgage. Accordingly, the fact that Gladstone is the sole Stonewell stockholder of record does not entitle him to summary judgment on his third-party petition.

Finally, the Court finds that the Magistrate correctly found that there is a material issue of fact as to whether Gladstone was acting as Weiss' nominee in causing Stonewell to be formed and to acquire the Center Point Mall mortgage. The testimony of Lyle Pfeffer and Michael Blutrich establishes a credibility issue as to whether Gladstone was acting as Weiss' nominee in the Center Point Mall Mortgage transaction. See (Doc. No. 1777, ex. 1 at 54-57; Doc. No. 1779, ex. 1 at 178-79; Doc. No. 1777, ex. 2 at 44 & 47).

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[2] This argument ignores the United States' contention that Gladstone was acting as Weiss' nominee and thus Weiss effectively controlled Stonewell and held title and interest in the corporation. This issue is discussed infra.

The United States has two objections to the Magistrate Judge's Report and Recommendation. See (Doc. No. 1831). First, the United States objects to the finding of fact that Jasper Properties Corporation transferred only the Center Point Mall Mortgage to Future Diversified Projects, Inc. to be used as part of the Capital Properties transaction. See id. The United States claims that Jasper Properties transferred the Center Point Mall property itself and not just the Mortgage to Future Diversified to be used in the Capital Properties Transaction with LifeCo Investment Group, Inc. ("LIFECO"). Accordingly, the Capital Properties Transaction resulted in the transfer of the Center Point Mall property to LIFECO from Future Diversified in exchange for LIFECO stock.

The Court finds that the evidence supports the United States' position that Future Diversified received the Center Point Mall property from Jasper Properties and in turn transferred the Mall property to LIFECO in the Capital Properties transaction. See (Doc. No. 1778, ex. 2(C) at 54-57, ex. 2(B) at 114, ex. 3 at 105-113; Doc. No. 1779, ex. 1 at 192-94, ex. 4 ¶ 3, ex. 5 ¶ 4; Doc. No. 1777, ex. 2 at 37.

The United States' second objection is to the Magistrate Judge's finding that the United States has not offered any evidence to rebut Gladstone's showing that Stonewell. purchased the Center Point Mall Mortgage for value. See (Doc. No. 1819 at 11). The United States objects to the finding to the extent that it constitutes a finding of fact that the United States will be unable to contest at trial. The Court finds that despite the apparent failure of the United States to provide such evidence in its opposition to Gladstone's Motion for Summary Judgment, it is not precluded from presenting evidence on the issue at trial as issues of fact remain as to Gladstone's role and relationship to Weiss in this matter.

## CONCLUSION

After careful review the Court is in agreement with the Magistrate Judge's well reasoned Report and Recommendations. The Court hereby **AFFIRMS and ADOPTS** the Magistrate Judge's findings of fact and recommendations with the exception of the finding in the July 26, 2001 Report relating to the transfer of the Center Point Mall property as discussed above.

Based on the foregoing the Court **RULES** as follows:

1) The Third-Party Petitioner Richard Gladstone's Motion for Summary Judgment (Doc. No. 1761) is **GRANTED IN PART AND DENIED IN PART** in accordance with this Order.

2) The United States' Motion that Trial on Third-Party Petition of Richard Gladstone be Tried by the District Judge (Doc. No. 1800) is **DENIED**.

**DONE AND ORDERED** at Orlando, Florida, this 16th day of August, 2001.

/s/ Patricia C. Fawsett
PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

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## Appendix K

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**ORLANDO DIVISION**

Case No. 6:98-cr-99-Orl-19KRS

UNITED STATES OF AMERICA

-vs.-

SHOLAM WEISS, *et al*

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In re Claim of Richard Gladstone

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**REPORT AND RECOMMENDATION**

**TO THE UNITED STATES DISTRICT COURT**

This cause came on for consideration without oral argument on the Notice of Motion for Summary Judgment (Doc. No. 1761)[1] filed by claimant Richard Gladstone, which includes the Affidavit of Richard Gladstone in Support of Petitioner's Motion for Summary Judgment. The motion is supported by a memorandum of law (Doc. No. 1762) and a Statement of Material Facts (Doc. No. 1763). The United States responded to the motion by a memorandum in opposition. (Doc. No. 1775). The memorandum in opposition was supported by the declarations of James J. Black III (Doc. No. 1777), Edward B. Gaines (Doc. No. 1778) and Thomas K. Lindgren (Doc. No. 1779) and the United States of America's Counterstatement of Facts (Doc. No. 1776). At my request,

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[1] The motion cites to a number of exhibits. I have been informed by staff of the Office of the Clerk of Court that these exhibits are not in the Courts' files.

both parties filed supplemental memoranda of law (Doc. Nos. 1794 and 1795); the United States also filed another certification of Edward B. Gaines (Doc. No. 1796). The parties have also submitted their Joint Final Pretrial Statement (Doc. No. 1808).

The Honorable Patricia C. Fawsett, United States District Judge, referred the motion for summary judgment to me for issuance of a report and recommendation. For the reasons discussed herein, I recommend that the motion be denied.

## I. PROCEDURAL HISTORY.

On November 1, 1999, the jury in this criminal case returned guilty verdicts against Sholam Weiss and others. The jury also returned special verdicts of forfeiture, in which the jury found that all of the interest that Weiss had in Stonewell Corporation was forfeitable pursuant to 18 U.S.C. § 1963 for three reasons: (1) it was acquired or maintained in violation of 18 U.S.C. § 1962; (2) it afforded Weiss a source of influence over the LIFECO enterprise; and (3) it constituted, or was derived from, proceeds of racketeering activity. (Doc. Nos. 1276 ¶ 34). The jury also determined that Weiss obtained $3,100,000.00 as a result of the acts alleged in Racketeering Act 39 of Count One and in Count 40 of the Indictment, which sum was forfeitable. (*Id.* ¶ 42). Racketeering Act 39 and Count 40 allege that this money was used to acquire the Center Point Mall mortgage. Gladstone contends that the mortgage was subsequently transferred to Stonewell Corporation.

Judge Fawsett entered a final judgment of forfeiture against Weiss as part of the Judgment and Commitment Order. (Doc. No. 1372). She later entered an Amended Preliminary Order of Forfeiture. (Doc. No. 1445).

Richard Gladstone filed a claim of ownership to Stonewell Corporation pursuant to 18 U.S.C. § 1963(l). (Doc. No. 1406). Gladstone now seeks summary judgment in his favor on that claim.

## II. SUMMARY OF THE FACTS.

The Center Point Mall is located in Monmouth, New Jersey. (Schick Testimony, Doc. No. 1778, ex. 3 at 102, 106). In 1989, Center Mall, Inc., then the owner and developer of Center Point Mall, obtained a loan from United Jersey Bank/Central N.A. in the amount of $4,300,000, which was secured by a first mortgage on Center Point Mall (the "Center Point Mall mortgage"). (Gladstone Aff., Doc. No. 1761 ¶ 29).

On September 7, 1993, United Jersey Bank assigned the Center Point Mall mortgage, which was then in default, to Jasper Properties Corporation, which corporation was acting as a nominee for or controlled by Sholam Weiss. (Schick Testimony, Doc. No. 1778, ex. 3 at 106, 111: Pfeffer Deposition, Doc. No. 1777, ex. 1 at 50-51; Pfeffer Testimony, Doc. No. 1778, ex. 2(B) at 108; Blutrich Aff., Doc. No. 1779, ex. 5 ¶ 4). The money paid to United Jersey Bank as consideration for this assignment came from National Heritage Life Insurance Corporation ("NHLIC").[2] (Pfeffer Deposition, Doc. No. 1777, ex. 1 at 51-52). Although Jan Schneiderman, acting as the secretary of Jasper Properties Corporation, signed a document discharging the Center Point Mall mortgage, the discharge of the mortgage was not recorded in the public records. (Schick Testimony, Doc. No. 1778, ex. 3 at 111-12).

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[2] The jury in the criminal case found that $3,100,000.00 used to acquire the Center Point Mall mortgage were the proceeds of a mail fraud scheme in which NHLIC was the victim. (Indictment Count One, Racketeering Act 39 and Count 40 (Doc. No. 1); Special Verdict of Forfeiture ¶ 42 (Doc. No. 1276)).

Also in 1993, NHLIC entered into negotiations with Future Diversified Projects, Inc. ("Future Diversified") through which Future Diversified was to invest capital in NHLIC. Lyle Pfeffer, the President and shareholder of Future Diversified, was acting as Weiss' nominee in these negotiations. (Pfeffer Testimony, Doc. No. 1778, ex. 2(B) at 109). Future Diversified was to receive a package of mortgages and real property, referred to as the Capital Properties, to be used as the consideration for the purchase of shares of stock in the parent company of NHLIC, LifeCo Investment Group, Inc. ("LIFECO"). (Pfeffer Testimony, Doc. No. 1778, ex. 2(B) at 109-10). Jasper Properties Corporation transferred the Center Paint Mall mortgage to Future Diversified to be used as part of the Capital Properties. (Pfeffer Testimony, Doc. No. 1778, ex. 2(B) at 114). On November 15, 1993, LIFECO transferred its Class E preferred stock to Future Diversified in exchange for the Capital Properties. (Pfeffer Testimony, Doc. No. 1778, ex. 2(D) at 243; Schick Testimony, Doc. No. 1778, ex. 3 at 102).

In the summer of 1996, Weiss learned that the discharge of the Center Point Mall mortgage had not been recorded. Therefore, he made plans to sell the mortgage even though Future Diversified had transferred it to LIFECO. (Pfeffer Testimony, Doc. No. 1778, ex. 2(C) at 54-57). Weiss decided that Pfeffer would assign the Center Point Mall mortgage to Richard Gladstone in exchange for a cash payment of $550,000 and forgiveness of a $450,000 loan New Contenders Inc.[3] owed to Gladstone. (Pfeffer Testimony, Doc. No. 1778, ex. 2(C) at 59-60; Blutrich Aff., Doc. No. 1779, ex. 5 ¶ 9). The $450,000 loan by Gladstone to New Contenders, Inc. was a legitimate transaction, not part of the racketeering enterprise. (Pfeffer Testimony, Doc. No. 1778,

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[3] New Contenders, Inc. was a boxing promotion company owned by Michael Blutrich. (Blutrich Affidavit, Doc. No. 1779, ex. 5 ¶ 6).

ex. 2(C) at 60). Gladstone obtained the $450,000 loaned to New Contenders, Inc. from funds belonging to him and to his wife. (Gladstone Aff., Doc. No. 1761 ¶¶30-31).

In 1997, Gladstone caused Stonewell Corporation (Stonewell") to be incorporated in Nevada to accept assignment of the $4,300,000 note. Gladstone is the sole shareholder, officer and director of Stonewell. (Gladstone Aff., Doc. No. 1761 ¶¶ 15-20, 44).

Jasper Properties Corporation assigned the Center Point Mall mortgage to Stonewell in March 1997. (Gladstone Aff., Doc. No. 1761 ¶¶ 40-41). Blutrich and Pfeffer told Gladstone that Pfeffer was the sole shareholder, officer and director of Jasper Properties Corporation and that Pfeffer was authorized to engage in the transaction on behalf of the corporation. (Gladstone Aff., Doc. No. 1761 ¶ 42). Pfeffer gave Gladstone an affidavit confirming his authority to engage in this transaction. (Gladstone Aff., Doc. No. 1761 ¶ 41).

Gladstone did not negotiate the price to be paid by Stonewell to purchase the mortgage. (Gladstone Deposition, Doc. No. 1779, ex. 3 at 112, 120-21). He knew that the debtor was not paying on the loan and that the Center Point Mall had a large percentage of its space vacant. (Gladstone Deposition, Doc. No. 1779, ex. 3 at 112, 121). He did not perform any due diligence on the purchase, other than reviewing documents provided to him. (Gladstone Deposition, Doc. No. 1779, ex. 3 at 266-68, 283). Stonewell paid the $550,000 from loans made to it by Gladstone, Gladstone's wife and Wahoo International, a partnership that is not alleged to have been involved in Weiss's illegal activity. (Gladstone Aff., Doc. No. 1761 ¶ 43).

Gladstone denies that he was acting on behalf of Weiss in this transaction. (Gladstone Aff., Doc. No. 1761 ¶ 44). However, Pfeffer testified that Gladstone stated that he was acting as a nominee for Weiss in the Center Point Mall mortgage transaction. (Pfeffer Deposition, Doc. No. 1777, ex. 1 at 54-57; Pfeffer Deposition, Doc. No. 1779, ex. 1 at 178-79).[4] Pfeffer also stated that at the time Stonewell acquired the Center Point Mall mortgage, Gladstone was well aware of the lawsuits involving NHLIC and that a *lis pendens* had been filed on the Center Point Mall property. (Pfeffer Deposition, Doc. No. 1777, ex. 1 at 65; Pfeffer Deposition, Doc. No. 1779, ex. 1 at 183-84).

The Center Mall was sold by Order of the United States District Court for the Southern District of New York dated December 3, 1997. (Gladstone Aff., Doc. No. 1761 ¶ 47). After payment of real estate taxes and fees to the receiver, approximately $1,800,000 of the sales proceeds remained. (Gladstone Aff., Doc. No. 1761 ¶ 47). Gladstone asserts that this money belongs to Stonewell in partial satisfaction of the Center Point Mall mortgage.

## III. STANDARD OF REVIEW.

A party is entitled to judgment as a matter of law when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

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[4] Michael Blutrich testified that Weiss later confirmed that Gladstone was acting as his nominee. (Blutrich Deposition, Doc. No. 1777, ex. 2 at 44). Weiss instructed Blutrich not to speak directly with Gladstone about the Center Point Mall mortgage transaction because Weiss was using that transaction to straighten out the debt owed by Blutrich's company, New Contenders, Inc., to Gladstone. (*Id.* at 47).

Fed. R. Civ. P. 56(c). The substantive law applicable to the case determines which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

"The party seeking summary judgment bears the initial burden of identifying for the district court those portions of the record 'which it believes demonstrate the absence of a genuine issue of material fact.'" *Cox v. Administrator United States Steel & Carnegie*, 17 F.3d 1386, 1396 (11th Cir.)(*quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)), *modified on other grounds*, 30 F.3d 1347 (11th Cir. 1994). Once that showing has been made, the burden shifts to the party opposing the motion to establish, "through the record presented to the court, that it is able to prove evidence sufficient for a jury to return a verdict in its favor." *Cohen v. United Am. Bank*, 83 F.3d 1347, 1349 (11th Cir. 1996).

Summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In determining whether the moving party has satisfied its burden, the court considers all inferences drawn from the underlying facts in the light mast favorable to the party opposing the motion, and resolves all reasonable doubts against the moving party. *Anderson*, 477 U.S. at 255.

## IV. ANALYSIS.

Gladstone asserts that neither Stonewell Corporation nor any of its assets should be forfeited to the United States. He bases his claim on 18 U.S.C. § 1963(l), which provides generally that property belonging to a third party should not be forfeited if the third party had an interest in the property superior to that of the criminal defendant at the time of the racketeering violation or if the third party is a *bone fide* purchaser for value of the property with reasonably without

knowledge that the property was subject to forfeiture. The third party bears the burden of proof by a preponderance of the evidence under section 1963(l). *United States v. Gilbert*, 244 F.3d 888, 911 (11th Cir. 2001).

*A. Validity of the Special Verdict of Forfeiture.*

Gladstone asserts that the jury's special verdict of forfeiture must be set aside because it does not state with specificity the property the jury found to be forfeitable. He relies on the recent decision of the United States Court of Appeals for the Eleventh Circuit in *United States v. Gilbert*, 244 F.3d 888 (11th Cir. 2001).

In *Gilbert*, the jury in the criminal case found that the interest of Benjamin Kramer, a convicted defendant, in the Bell Gardens Bicycle Club was forfeitable. The jury was not asked to, and did not, determine the extent of Kramer's interest in this club. After hearing evidence in ancillary proceedings, the district court amended its initial order of forfeiture to state that Benjamin Kramer's interest in LCP, Ltd., one of the joint venture partnerships that formed the club, was forfeited. The Eleventh Circuit held that the district court improperly amended the jury's verdict, because the jury was never asked to determine whether LCP, Ltd. was forfeitable. *Id.* at 915-16.

The court also noted that even if the amended forfeiture order was proper, the United States could not force other defendants in the criminal case to file claims under section 1963(l) so that the United States could determine what interest it held in LCP, Ltd. The Eleventh Circuit suggested that the United States' remedy in that hypothetical situation would be to file a quiet title action in state court. *Id.* at 917 & n. 72.

In this case, the jury determined that Weiss' interest in Stonewell Corporation was forfeitable. Like the *Gilbert* jury, it was not asked to determine what interest, if any, Weiss had in Stonewell. Therefore, when Judge Fawsett entered the final forfeiture judgment against Weiss, the United States acquired only whatever interest Weiss had in Stonewell Corporation. Gladstone could have elected not to file a third-party claim under 18 U.S.C. § 1963(l), thereby forcing the United States to file a quiet title action to obtain a determination of the extent of its interest in Stonewell. Instead, Gladstone elected to file a third-party claim, which places the question of Weiss's interest, if any, in Stonewell as a matter to be decided by this Court.

Judge Fawsett did not amend the jury's forfeiture verdict in entering final judgment against Weiss. Therefore, the final judgment of forfeiture entered against Weiss, which forfeits Weiss' interest in Stonewell Corporation, controls. As such, the problem faced in *Gilbert* does not exist here. Accordingly, Gladstone's motion for summary judgment on the grounds that the forfeiture judgment is not valid should be denied.

*B. Material Issues of Fact Preclude Summary Judgment.*

Gladstone contends that he has always owned all right, title and interest in Stonewell Corporation. Gladstone asserts that because Weiss did not have any interest in Stonewell Corporation, the United States acquired no interest in Stonewell Corporation as a result of the forfeiture verdict. Therefore, Gladstone argues that the United States has no claim to Stonewell Corporation or any of its assets, including the proceeds from the sale of the Center Point Mall mortgage.

The United States contends that the jury forfeited Weiss' interest in Stonewell corporation, which includes Weiss's interest in the assets of Stonewell Corporation. It argues that because Stonewell Corporation was formed solely to act as Weiss's nominee in the Center Point Mall mortgage

transaction, Weiss owned or controlled that corporation through his nominee[5], Richard Gladstone. The United States argues, alternatively, that $3.100,000.00 that the jury found to be forfeitable is directly traceable to the proceeds of the sale of the Center Point Mall mortgage.[6] The United States asserts that its interest in these proceeds accrued, under the relation back doctrine[7], on the date that Jasper Properties Corporation acquired the Center Point Mall mortgage with funds fraudulently obtained from NHLIC, and that Gladstone cannot show that he purchased the mortgage without reasonable cause to know that the property was subject to forfeiture.

Based on these arguments, two issues are presented in this ancillary forfeiture proceeding:

1. Whether Gladstone has shown by a preponderance of the evidence that he has the legal right, title and interest in Stonewell Corporation which was vested in him rather than in Weiss;

2. Alternatively, whether Gladstone has shown by a preponderance of the evidence that he, acting on behalf of Stonewell Corporation, was a *bona fide* purchaser for value of the Center Point Mall mortgage who was reasonably without knowledge that the mortgage was subject to forfeiture.

*See* 18 U.S.C. § 1963(l)(6).

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[5] "'[N]ominee in its commonly accepted meaning connotes the delegation of authority to the nominee in a representative or nominal capacity only, and does not connote the transfer or assignment to the nominee of any property in, or ownership of, the rights of the person nominating him.'" *Braxton v. United* States, 858 F.2d 650, 653 n.6 (11th Cir. 1988).

[6] The United States raised this alternative argument for the first time in its supplemental memorandum of law. (Doc. No. 1795).

[7] 18 U.S.C. § 1963(c).

Genuine issues of material fact preclude summary judgment on Gladstone's claim. Gladstone denies that he acted as a nominee for Weiss in causing Stonewell Corporation to be formed and to acquire the Center Point Mall mortgage. Pfeffer testified, however, that Gladstone admitted that he was acting on behalf of Weiss in the transaction. As such, there is a credibility issue concerning whether Gladstone actually held right, title and interest in Stonewell Corporation, or whether Weiss effectively held such interest with Gladstone acting only as Weiss' nominee.

Gladstone avers that he purchased the Center Point Mall mortgage with his personal funds and with forgiveness of a legitimate debt owed to him by New Contenders, Inc. The United States has not offered any evidence to rebut Gladstone's showing that Stonewell Corporation purchased the Center Point Mall mortgage for value. However, Pfeffer testified that Gladstone had reason to know that the Center Point Mall mortgage was involved in Weiss's illegal activity, which would render the property subject to forfeiture. Gladstone denies such knowledge. Once again, there is a credibility issue concerning whether Gladstone was reasonably without notice that the Center Point Mall mortgage was subject to forfeiture when Stonewell Corporation purchased it.

## V. RECOMMENDATION.

For the reasons set forth above, I respectfully recommend that the Court DENY Gladstone's motion for summary judgment.

Failure to file written objections to the proposed findings and recommendations contained in this report within **eleven (11) days** from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

Respectfully recommended in Orlando, Florida on this 26th day of July, 2001.

/s/ Karla R. Spaulding
KARLA R. SPAULDING
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
Presiding District Judge and Courtroom Deputy
Counsel of Record
Unrepresented Parties

**Appendix L**

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**ORLANDO DIVISION**

Case No. 6:98-CR-99-ORL-19KRS

UNITED STATES OF AMERICA,

Plaintiff,

-vs.-

SHOLAM WEISS, et al.,

Defendants.

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IN RE CLAIM OF RICHARD GLADSTONE

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**SUPPLEMENTAL BRIEFING ORDER**

The jury in the underlying criminal case found that any interest Sholam Weiss had in Stonewell Corporation was forfeitable under 18 U.S.C. § 1963. The jury was not asked to determine what interest, if any, Weiss had in Stonewell Corporation.

Richard Gladstone filed a claim of ownership of Stonewell Corporation pursuant to 18 U.S.C. § 1963(l). He asserts that the jury must have found that Weiss' stock ownership in Stonewell Corporation was forfeitable, because stock ownership is the only interest an individual can have in a corporation. He cited no authority in support of this proposition. Because Gladstone has always owned all of the stock

in Stonewell Corporation, he filed a motion for summary judgment premised on the undisputed fact that Weiss did not own shares of stock of Stonewell Corporation.[1]

The United States does not dispute Gladstone's contention that Weiss does not own any shares of Stonewell Corporation. Rather, it contends that the jury's special verdict of forfeiture entitles the United States to Weiss' interest in any assets of Stonewell Corporation. The only authority cited by the United States in support of its position is *United States v. Wyly*, 193 F.2d 289 (5th Cir. 1999). In *Wyly*, shareholders of a corporation filed a claim to certain assets of the corporation that a jury in a criminal case determined to be forfeitable. The United States Court of Appeal for the Fifth Circuit, relying on Louisiana law, found that the shareholders had no standing to challenge the forfeiture because the shareholders only interest was in the stock of the corporation, not its assets. This set of facts is not similar to those presented here, and Louisiana law appears to have no bearing on the definition of "interest" as used in the jury's special verdict of forfeiture in this case.

Accordingly, it is ORDERED that, on or before July 13, 2001, the parties shall each file and serve a supplemental memorandum of law addressing the question of whether the forfeitable "interest" Weiss had in Stonewell Corporation, if any, includes assets of Stonewell Corporation as well as stock of Stonewell Corporation. It is incumbent on the United States, if it wishes to survive summary judgment, to state with specificity the law and the facts that support its

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[1] Gladstone also asserts that the jury's special verdict of forfeiture is invalid because the jury was not asked to determine the extent of Weiss' interest in Stonewell Corporation, citing *United States v. Gilbert*, 244 F.3d 858 (11th Cir. 2001). I issue this briefing order to ask the parties to address the legal effect of the jury's special verdict of forfeiture assuming that it is valid, so that, in my report and recommendation to Judge Fawsett, I can fully address all the issues presented.

assertion that the jury's special verdict of forfeiture can be legally construed to be a forfeiture of the assets of Stonewell Corporation.

DONE and ORDERED at Orlando, Florida, this 26th day of June, 2001.

/s/ Karla R. Spaulding
KARLA R. SPAULDING
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
Presiding District Judge & Courtroom Deputy Clerk
Counsel of Record (by facsimile transmission on 6/26/01 and by U.S. Mail)

# Appendix M

## 18 U.S.C.A. § 1963

**Effective: [See Text Amendments]**

UNITED STATES CODE ANNOTATED
United States Code Annotated Currentness
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
Title 18. Crimes and Criminal Procedure (Refs & Annos)
**PART I. — CRIMES**
Part I. (Refs & Annos)
**CHAPTER 96 — RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS**
Chapter 96 — Racketeer Influenced and Corrupt Organizations (Refs & Annos)

§ 1963. Criminal penalties

**(a)** Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law—

**(1)** any interest the person has acquired or maintained in violation of section 1962;

**(2)** any—

**(A)** interest in;

**(B)** security of;

**(C)** claim against; or

**(D)** property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

**(3)** any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

**(b)** Property subject to criminal forfeiture under this section includes—

**(1)** real property, including things growing on, affixed to, and found in land; and

**(2)** tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

**(c)** All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (l) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

**(d)(1)** Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

**(A)** upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

**(B)** prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

**(i)** there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

**(ii)** the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

*Provided, however,* That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

**(2)** A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property,

if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

**(3)** The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

**(e)** Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

**(f)** Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

**(g)** With respect to property ordered forfeited under this section, the Attorney General is authorized to—

**(1)** grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

**(2)** compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to—

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred,

or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

**(i)** Except as provided in subsection (l), no party claiming an interest in property subject to forfeiture under this section may—

**(1)** intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

**(2)** commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

**(j)** The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

**(k)** In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

**(l)(1)** Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

**(2)** Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

**(3)** The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

**(4)** The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

**(5)** At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence

presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

**(6)** If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

**(A)** the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

**(B)** the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

**(7)** Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

**(m)** If any of the property described in subsection (a), as a result of any act or omission of the defendant—

**(1)** cannot be located upon the exercise of due diligence;

**(2)** has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

CREDIT(S)

(Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 943, and amended Pub.L. 98-473, Title II, §§ 302, 2301(a)-(c), Oct. 12, 1984, 98 Stat. 2040, 2192; Pub.L. 99-570, Title XI, § 1153(a), Oct. 27, 1986, 100 Stat. 3207-13; Pub.L. 99-646, § 23, Nov. 10, 1986, 100 Stat. 3597; Pub.L. 100-690, Title VII, §§ 7034, 7058(d), Nov. 18, 1988, 102 Stat. 4398, 4403; Pub.L. 101-647, Title XXXV, § 3561, Nov. 29, 1990, 104 Stat. 4927.)

## Appendix N

### Federal Rules of Criminal Procedure, Rule 32.2

UNITED STATES CODE ANNOTATED
United States Code Annotated Currentness
FEDERAL RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS
Federal Rules of Criminal Procedure for the United States District Courts (Refs & Annos)
VII. POST-CONVICTION PROCEDURES
VII. Post-Conviction Procedures

### Rule 32.2. Criminal Forfeiture

**(a) Notice to the Defendant.** A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute.

**(b) Entering a Preliminary Order of Forfeiture.**

**(1) In General.** As soon as practicable after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay. The court's determination may be based on evidence already in the record, including any

written plea agreement or, if the forfeiture is contested, on evidence or information presented by the parties at a hearing after the verdict or finding of guilt.

**(2) Preliminary Order.** If the court finds that property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment or directing the forfeiture of specific property without regard to any third party's interest in all or part of it. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

**(3) Seizing Property.** The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing third-party rights. At sentencing — or at any time before sentencing if the defendant consents — the order of forfeiture becomes final as to the defendant and must be made a part of the sentence and be included in the judgment. The court may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.

**(4) Jury Determination.** Upon a party's request in a case in which a jury returns a verdict of guilty, the jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.

**(c) Ancillary Proceeding; Entering a Final Order of Forfeiture.**

**(1) In General.** If, as prescribed by statute, a third party files a petition asserting an interest in the property to be forfeited, the court must conduct an ancillary proceeding, but no ancillary proceeding is required to the extent that the forfeiture consists of a money judgment.

**(A)** In the ancillary proceeding, the court may, on motion, dismiss the petition for lack of standing, for failure to state a claim, or for any other lawful reason. For purposes of the motion, the facts set forth in the petition are assumed to be true.

**(B)** After disposing of any motion filed under Rule 32.2(c)(1)(A) and before conducting a hearing on the petition, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure if the court determines that discovery is necessary or desirable to resolve factual issues. When discovery ends, a party may move for summary judgment under Federal Rule of Civil Procedure 56.

**(2) Entering a Final Order.** When the ancillary proceeding ends, the court must enter a final order of forfeiture by amending the preliminary order as necessary to account for any third-party rights. If no third party files a timely petition, the preliminary order becomes the final order of forfeiture if the court finds that the defendant (or any combination of defendants convicted in the case) had an interest in the property that is forfeitable under the applicable statute. The defendant may not object to the entry of the final order on the ground that the property belongs, in whole or in part, to a codefendant or third party; nor may a third party object to the final order on the ground that the third party had an interest in the property.

**(3) Multiple Petitions.** If multiple third-party petitions are filed in the same case, an order dismissing or granting one petition is not appealable until rulings are made on all the petitions, unless the court determines that there is no just reason for delay.

**(4) Ancillary Proceeding Not Part of Sentencing.** An ancillary proceeding is not part of sentencing.

**(d) Stay Pending Appeal.** If a defendant appeals from a conviction or an order of forfeiture, the court may stay the order of forfeiture on terms appropriate to ensure that the property remains available pending appellate review. A stay does not delay the ancillary proceeding or the determination of a third party's rights or interests. If the court rules in favor of any third party while an appeal is pending, the court may amend the order of forfeiture but must not transfer any property interest to a third party until the decision on appeal becomes final, unless the defendant consents in writing or on the record.

**(e) Subsequently Located Property; Substitute Property.**

**(1) In General.** On the government's motion, the court may at any time enter an order of forfeiture or amend an existing order of forfeiture to include property that:

**(A)** is subject to forfeiture under an existing order of forfeiture but was located and identified after that order was entered; or

**(B)** is substitute property that qualifies for forfeiture under an applicable statute.

**(2) Procedure.** If the government shows that the property is subject to forfeiture under Rule 32.2(e)(1), the court must:

**(A)** enter an order forfeiting that property, or amend an existing preliminary or final order to include it; and

**(B)** if a third party files a petition claiming an interest in the property, conduct an ancillary proceeding under Rule 32.2(c).

**(3) Jury Trial Limited.** There is no right to a jury trial under Rule 32.2(e).

CREDIT(S)

(Added Apr. 17, 2000, eff. Dec. 1, 2000, and amended Apr. 29, 2002, eff. Dec. 1, 2002.)

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